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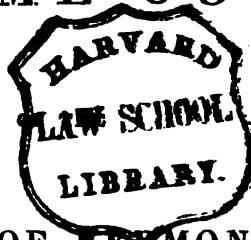
OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT



STATE OF VERMONT.

**REPORTED BY THE JUDGES OF SAID COURT, AGREEABLY TO A
STATUTE LAW OF THE STATE.**

0

VOL. IX.

**BURLINGTON:
CHAUNCEY GOODRICH.**

1838.

H. JOHNSON & Co. PRINTERS,
BURLINGTON, VT.

**JUSTICES OF THE SUPREME COURT, AND, EX-OFFICIO, CHANCELLORS
OF THE COURT OF CHANCERY, DURING THE TIME
EMBRACED IN THESE REPORTS.**

CHARLES K. WILLIAMS, *Chief Justice.*
STEPHEN ROYCE,
SAMUEL S. PHELPS,
JACOB COLLAMER,
ISAAC F. REDFIELD. } *Assistant Justices.*

ERRATA.

Page 11, line 25, insert *and*, between "that" and "before."

" 35, " 19 from top, for "nor could we," read, *we could not*.

" 74, " 17 " " for "or," read *and*.

" 149, " 2 " " for "ingenuous," read *substantial*.

" 209, " 29 " " for "is made," read *is not made*.

" 406, " 4 " " for "for State v. Bates, 3 Vt. Rep." read
Steele v. Bates, 2 Vt. Rep.

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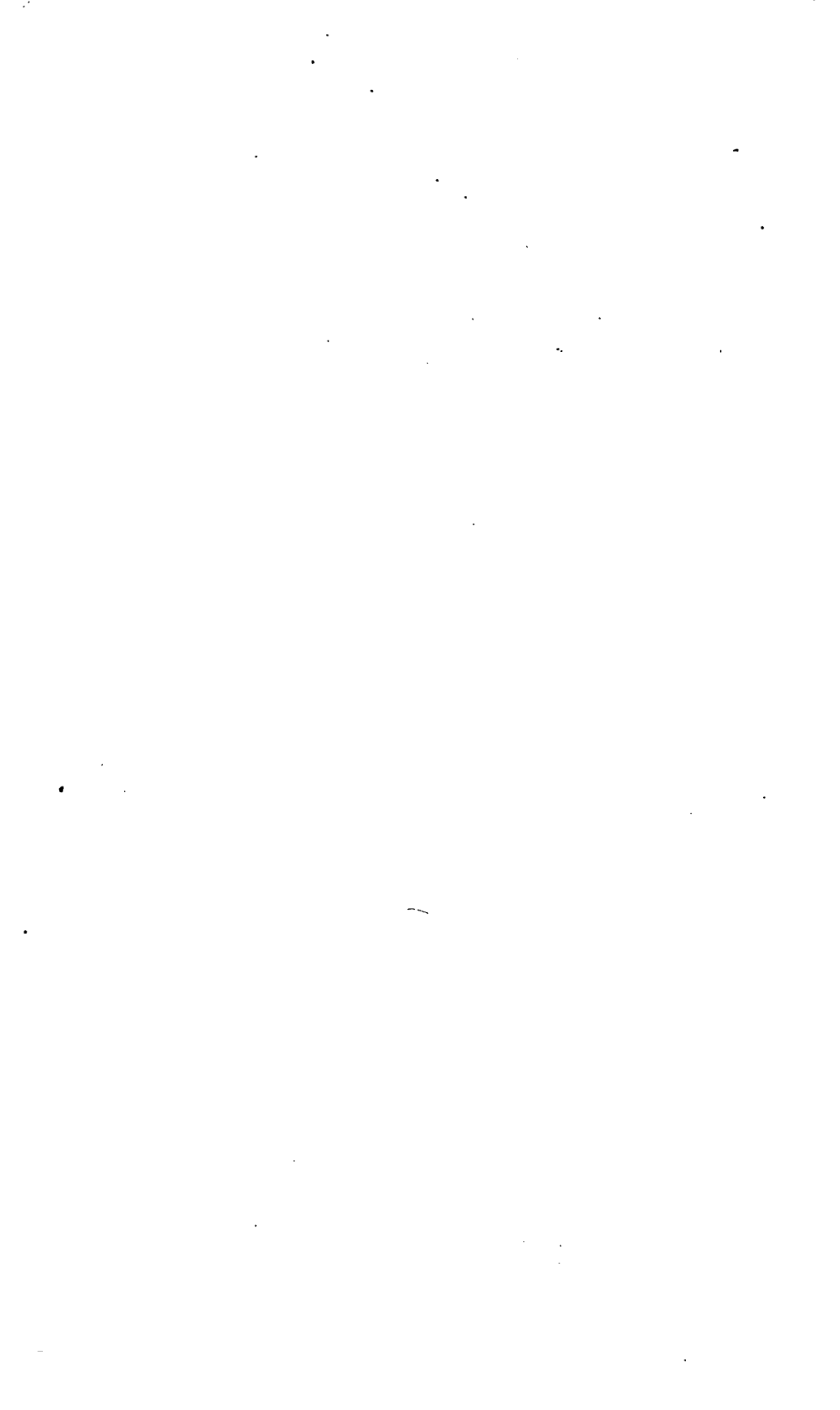
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WASHINGTON COUNTY.

MARCH TERM, 1836.

PRESENT, HON. STEPHEN ROYCE, }
" SAMUEL S. PHELPS, } *Assistant Justices.*
" ISAAC F. REDFIELD, }

JOHN A. WARNER vs. STOCKWELL & FOSTER.

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A citizen is not exempted from enrolment in the militia on account of bodily infirmity, if his infirmity is not open to observation, and is unknown to the officer making the enrolment. And upon being enrolled he becomes subject to military jurisdiction, until disenrolled in the manner prescribed by statute.

In the imposition and remission of fines militia officers act judicially, and in cases within their jurisdiction their final decisions are conclusive.

Sergeants' warrants may be signed in blank, and entrusted to captains, with authority to fill up and deliver out the same to the sergeants of their respective companies. And when such a warrant is accepted and acted upon by a sergeant, its validity is not impaired by the fact, that it had previously been filled up for another person, and delivered to him.

The doings of a sergeant under a writ of execution for a fine, if regular in form, will be sustained by proof that he was a sergeant *de facto*, having been duly elected and sworn.

If a debtor is committed on a writ of execution, when it ought to have been levied on property, his remedy is by an action against the officer. The commitment is not thereby rendered void. And it *seems*, that to entitle the debtor to any redress in such a case, he should have been willing to acquiesce in the taking of his property.

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Trespass for assault and battery, and false imprisonment. The plaintiff had been enrolled as a private in a company of militia commanded by the defendant Stockwell, and having been amerced in a fine for non-appearance at a training of said company, was committed to jail by the defendant Foster, as sergeant of said company, on an execution for the fine aforesaid. This was the trespass complained of. Plea *not guilty*, with notice of justification. The questions raised on trial will appear from the following bill of exceptions :

Plaintiff made a *prima facie* case under the general issue, and rested. The defendants then showed the existence of the company, that plaintiff resided within the limits of the company, and was between the age of eighteen and forty-five years:—that defendant Stockwell, being duly commissioned and sworn as Lieutenant, was commanding officer of the company,—that plaintiff was enrolled and warned to attend the annual June training in the year 1835; that he did not attend and was amerced in the sum of \$2, by defendant Stockwell, for *non appearance*.

The citation issued by defendant Stockwell to plaintiff, dated 31st July, 1835, and the return thereon, were offered by defendant, objected to by plaintiff, and admitted.

The execution bearing the same date, but in fact not issued until the expiration of twelve days from the return of said citation, directed to defendant Foster, as sergeant, and upon which it was admitted he afterwards committed plaintiff to the jail, on his refusing to pay the amount thus specified, was then offered by defendants, objected to by plaintiff, but admitted by the Court.

The defendants, further to sustain the issue on their part, offered in evidence a warrant signed by the Colonel of the regiment to defendant Foster, as sergeant, which was objected to, but admitted. Defendants also proved that defendant Foster had been sworn to the discharge of the duties of Sergeant, and had said warrant in his possession before he arrested plaintiff. The plaintiff then offered to show, that at the time he was warned to do military duty as aforesaid, and ever since, and for many years before that time, and from childhood, he had been laboring under very considerable bodily infirmity, in consequence of having a rib or ribs fractured many years ago, so that he ought not to be subject to do military duty, and was not an *able-bodied* man within the meaning of the statute; and after the

training named, and before the amercement, he notified the defendant Stockwell of said disability. The plaintiff also offered to show, that the warrant aforesaid was signed by said Colonel in blank, and given to defendant Stockwell, to fill up as occasion might require ; that he had filled it up with the name of and delivered it to another sergennt, and afterwards, without his consent, taken it back, and made use of it for defendant Foster. This testimony was objected to, and rejected by the Court.

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The plaintiff also offered testimony tending to show, that within twelve days after said training, he applied to defendant Stockwell to be excused from any amercement on account of said neglect, by reason of said bodily infirmity, and that said Stockwell declared his excuse insufficient.

Testimony was also given on the part of the plaintiff tending to show, that on the first day of August 1835, he applied to one Atwood, Colonel of the regiment to which this company belonged, to remit said fine, and on that occasion showed him a certificate of the surgeon of the regiment, that his disability, before named, was sufficient to excuse him from military duty ; that the Colonel informed the plaintiff that he could not attend to the hearing of the matter within the next six days, and recommended him to apply to some other of the field officers, but finally appointed the first Saturday in September after, for hearing the matter, of which defendant Stockwell was immediately notified, and that he issued the execution, notwithstanding that, before the time set for hearing, plaintiff was committed on it. The plaintiff also gave evidence tending to show, that at the time, and before he was arrested on said execution, he had, within a few rods of the place, personal property to a large amount, of which he was the undoubted owner, and this was known to both defendants ; and that he requested defendant Foster (Stockwell being present) to levy the execution upon said property instead of his body, and that he refused to pay the money on said execution, only because he found it would preclude him from afterwards contesting the validity of the execution ; and so informed defendants ; and that both defendants absolutely refused to comply with said request, saying they should immediately commit him to jail unless the money was paid, and therefore did forthwith arrest and commit him.

The Court decided that if the testimony on the part of the defendant was believed, and notwithstanding the testimony on

Washington, the part of the plaintiff, and so charged the jury, the defendants were entitled to a verdict. To which decisions of the

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Court in rejecting testimony, and in their charge to the jury, the plaintiff excepted; verdict for defendants.

L. B. Peck for plaintiff.—1. The Court erred in excluding the evidence offered, tending to show that the plaintiff was not liable to do military duty. The power and jurisdiction of militia officers, in the assessment of all fines, is special and limited. If they exceed their jurisdiction, they, as well as the officer, who undertakes to execute their process, become trespassers. (2 Wm. Black. 1145. 10 Co. 75. 1 Saund. 74, and the notes.) The position will not be controverted, that to give validity to the proceedings of any Court, it must have jurisdiction of the *person* of the defendant, and of the cause. (*Borden vs. Fitch*, 15 Johns. Rep. 141. *Mills vs. Martin*, 19 Johns. Rep. 33.) If the plaintiff was not liable to do military duty by reason of bodily infirmity, or was otherwise exempt, the defendant Stockwell, had no jurisdiction of his person, and all the proceedings against him were a nullity. In *Wise vs. Withers*, (3 Cranch Rep. 331.) the Supreme Court of the United States, held, first, that a Justice of the Peace within the District of Columbia, was not liable to do military duty; secondly, that a Court Martial had no jurisdiction over him; and, thirdly, that the Court and the officer who arrested him, were all trespassers. This case is cited and approved by Chief J. Spencer in *Mills vs. Martin*, and it would seem to be decisive of the present question. To the same point is Sabin's case cited by Lord Mansfield in *Mos-tyn vs. Fabrigas*, (1 Cowp. 175.) *Curry vs. Pringle*, 11 Johns. Rep. 444. *Bissell vs. Gold*, 1 Wend. 210. *Suydam vs. Wyck-off*, 13 Johns. Rep. 144. The first section of the act of 1818, (1 Comp. Stat. 611) provides that each and every free, *able-bodied* white male citizen of this State, or any other of the United States, residing within this State, who is or shall be of the age of eighteen years, and under the age of forty five years," (with certain exceptions) "shall severally and respectively be subject to the requisitions of this act." If the plaintiff was not *able-bodied* within meaning of the Statute, he was not liable to be enrolled by the very terms of the act, and the defendant, Stockwell, had no more jurisdiction over him than he would have had, had the plaintiff been under the age of eighteen years. No lawyer certainly will controvert the position that an indi-

vidual is not liable to military duty who is under the age of eighteen years or over forty-five. The same principle must be applied to the case of one who is not *able-bodied*. *Howe vs. Gregory*, 1 Mass. Rep. 81. *Commonwealth vs. Fitz*, 11 Mass. Rep. 540. *Pitts vs. Weston*, 2 Greenleaf's Rep. 349.

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2. The evidence in relation to the warrant ought to have been admitted and the warrant itself excluded. A warrant is the only legal evidence of the appointment of a sergeant—it is the foundation of all his authority. The 8th section of the act of 1818 (1 Comp. L. 614.) provides that “all non-commissioned staff officers and sergeants shall receive warrants, under the hand of the commanding officer of the respective regiments.” The authority to issue a warrant must be regarded as a personal trust, and as implying, to some extent, the exercise of judgment and discretion. The commanding officer ought to enquire so far as to ascertain that the appointment was regularly made. This enquiry can never be made when the warrants are signed in blank and filled up at the pleasure of the commanding officer of a company. But at all events, after a warrant has been once filled up and delivered over, it cannot be re-called, as was done with the case at bar, and filled up for, and delivered to some other person, without the acquiescence of the person to whom it was first delivered. (*Burt vs. Dimmock*, 11 Pick. 355.)

It is insisted that there was error in the direction the court gave the jury—

1. When the plaintiff applied to the Colonel to remit the fine, and after he had fixed upon a time and place for the hearing, of which Stockwell was duly notified, Stockwell's authority to issue an execution was entirely suspended, and his subsequent proceedings void, and the jury should have been so instructed. *Case vs. Shepherd*, 2 Johns Cas. 27. *Briggs vs. Wardwell*, 10 Mass. Rep. 356. The 35th section of the act of 1818, it is true, requires that the time fixed for hearing the application for a remission of the fine, shall be within six days from the time application is made to the officer for that purpose. But the statute in this particular is merely *directory*. The *People vs. Allen*, 6 Wend. 486. *Pond vs. Negus & al.* 3 Mass. Rep. 230. *Waters vs. Davies*, 4 Vermont Rep. 601.)

2. The arrest and imprisonment of the plaintiff, after he had requested the defendants to levy the execution upon his property in lieu of his body, was unauthorized and rendered them tres-

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passers. It is only in those cases where personal property cannot be found that an officer is authorized to arrest the body of a debtor on execution. (1 Comp. L. 209. C. 28. Sec. 2.) In the present case property was tendered before the arrest, and it was the duty of the defendants to take it, and the jury should have been so directed. *Hall vs. Hall*, 1 Root, 120. The defendants exceeded their authority. They acted arbitrarily and oppressively. The process was abused, and for this trespass lies. (1 Chitt. Plead. 169.)

P. Dillingham, Jr. for defendants.—1. Plaintiff offered to prove that when the penalty, for which the fine was assessed, was incurred, he was exempt from military duty, on account of some physical disability.

This was inadmissible from the following considerations.

1st. No question was made that Stockwell was the lawful commanding officer of the company within the limits of which the plaintiff lived.

2nd. Nor was it made a question that the plaintiff was a free white male citizen of this State, over 18 and under 45 years of age, and, *prima facie*, at least, able-bodied.

3d. It was not pretended that the plaintiff came within any of the exceptions mentioned in the militia act, so called. (Stat. 611.) Hence we contend that it was lawful for the commanding officer, in whose company, he lived to enroll him in said company, nay, it was his duty so to do, unless he found his name already on the roll (see 1st Sec. Militia act.) The plaintiff had no apparent or visible inability, and if in his organization bodily, there was any "*latent defect*" or invisible infirmity, yet for enrolling him, he cannot hold the commanding officer liable in this action.

The commanding officer of the company was bound to enquire as to plaintiff's liability to be enrolled. He had jurisdiction of the matter to be determined; and having jurisdiction of the matter, however erroneous his decision, or malicious his motive, this action cannot be sustained. 1 Salk. 306. 2 T. R. 225. 5 ib. 186. 1 Ld. Raym 466. 6 T. R. 449. 3 M. & S. 325. On the questions of age and ability of body, the commanding officer acts judicially. (Stat. ch. 96. Sec. 1.) In all cases where a magistrate has a duty to perform, which devolves upon him any enquiry or determination, he then acts judicially. *Barnett vs. Peck*, 6 Vt. Rep. 456. *Wood vs. Peake*, 8 Johns. Rep. 69.

3 T. Rep. 38. 2 East. 244. *Mower vs. Allen & Bateman*, D. Washington, March, 1336.
 Chip. Rep. 381.

II. The time fixed by the field officer for hearing the plaintiff's application, was beyond the period when he had or could have any jurisdiction of the matter. The 35 Sec. ch. 96, Vt. Stat. giving the right to apply to a field officer, makes it imperative on him to set the time of hearing within six days ; with liberty, at the end of that time, to extend the time not exceeding six days more. If this section should be construed to be merely directory, the consequence would be, that the field officer might set the time one year as well as one month, in which time, the death or resignation of one of the officers would be likely to render all the proceedings void. Again, if the Statute be directory in this particular, as to the field officer's duty, then it is equally so as to the commanding officer's, and if he sees fit not to wait, but issues his execution, as in this case, he is not thereby a trespasser.

Applications in these cases, are not like appeals from an inferior to a superior jurisdiction, which vacate the judgment of the inferior court, but a mere stay of proceedings, that another person may remit the fine if he chooses. Even if an irregular appeal be taken, execution may issue. (*Loveland vs. Burton*, 2 Vt. Rep. 521.)

III. The offer to show an irregular warrant to the defendant Foster was clearly inadmissible.

If the sergeant, who serves the captain's notice or execution, has been appointed and sworn, that is sufficient, even without a warrant. "A corporal cannot object that the corporal who warned him, had not received his warrant, and therefore was not legally authorised to execute his order." (*Hyde vs. Melvin*, 2 Johns. Rep. 521.)

"No action lies against a magistrate, though he was not duly qualified to act." (3 B. & A. 266.) At any rate, this warrant was regular on its face, and could not be collaterally impeached, so as to make Foster, who had acted under it, a trespasser in this action.

IV. Is an officer, holding an execution, liable in an action of Trespass and false-imprisonment, for arresting the body of the debtor, when he is informed that the debtor has sufficient personal property, within his precinct, to satisfy the execution and charges?

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In *Bates vs. Carter*, 5 Vt. Rep. 608., and *Dow vs. Smith*, 6 Vt. Rep. 520., it is clearly settled, that the first sec. of No. 1. ch. 28. Vt. Statute, is entirely directory; and the reasoning of the court in the latter case, will apply with equal force to the 2d sec. of the same act. If it is not "to be endured that an officer must see a debtor in execution escape from the county, because the officer has not been to the debtor's house with the execution," then certainly it cannot be endured that he shall see him escape, because he has not searched through his precinct, to see if personal property may be found whereon to levy, and satisfy his execution.

In the above case of *Dow vs. Smith*, the court say,

"The only practicable course is to treat the officer's proceedings as good, and if his disregard of this directory Statute is "without excuse, malicious, and productive of injury to the "debtor, let redress be had by an action on the case therefor "against him;" and such it may be truly said, "has been the practical construction of the 2d sec. of this Statute, ever since its adoption." If after an arrest made by the officer, he should refuse to receive personal property, when offered, he would not, for that, be liable in trespass and false-imprisonment. See 3 Com. Dig. 493.—where it is decided that false-imprisonment does not lie against an officer for refusing bail.

Should it be objected that more than legal costs were allowed and included in the execution, the case of *Johnson vs. Wilkinson*, 17 Johns. Rep. 145., is decisive of the point, that for *that* cause this action does not lie.

ROYCE, J. Delivered the opinion of the court.

We have to consider the several grounds taken by the plaintiff, in answer to the justification relied upon by the defendants.

He begins by insisting that he had a right to prove, in support of this action, his inability to perform military duty, in consequence of an internal injury received in childhood. The statute has imposed this duty upon "every free, able-bodied, white, male citizen of this State, or of any other of the United States, residing within this State, who is or shall be of the age of eighteen years, and under the age of forty-five years," with certain exceptions. It is assumed that all these qualifications must co-exist, to subject an individual to military jurisdiction; that the question of jurisdiction is, from its nature, at all times, an open question; and consequently, that if, in fact, the plaintiff was not

an *able-bodied* citizen, the whole proceedings against him should be treated as void. In order to determine how far this conclusion should be admitted, some farther notice of the Statute becomes necessary. Having in these general terms designated those who are subject to the requisitions of the act, it directs that they shall be enrolled in the militia, by the captains or commanding officers of the respective companies, within whose bounds they shall reside. It is made the duty of such commanding officers to enroll every such citizen, including those, who, from time to time, shall come to reside within the bounds of their respective companies. And in all cases of doubt respecting the age of the party to be enrolled, he is required to prove his age to the satisfaction of the commanding officer. Notice of such enrollment is to be immediately given to the person enrolled, though a legal warning to attend a company, battallion, or regimental muster, or training, is allowed to operate as notice of enrollment. By the second section various officers of the United States, and of the State government, and persons in certain situations and employments, are excepted from the operation of the Statute; and all such are declared to be exempted from enrollment.

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From all this it is evident, that the question of jurisdiction must relate to the time of enrollment, which is the first act and the basis of all subsequent proceedings. On this principle it has been adjudged, that in cases of express and permanent exemption from military duty, there was a want of jurisdiction over the party exempted, which rendered all proceedings against him void. *Wise v. Withers*, 3 Cra. 331.—*McLane v. Stuart*, reported in Swift's Evidence, 359. And it must be conceded, that if the first section of the act did not extend to the plaintiff, his case is quite as favorable, as if he had come within the exemptions of the second section. The statute, however, must receive a practicable construction. There are various disabilities arising from bodily infirmity. Some are visible and notorious, as the want of a foot, a hand, an eye, and the like, while others are not open to observation. Some are permanent, and others temporary. Now to the first class it is manifest that the statute was never intended to apply; and therefore it may for the present purpose be admitted, that thus far the military jurisdiction should be denied. As to permanent infirmities of the other class, it is clear that if they render the party unable to

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discharge the duties of a soldier, they ought fully to absolve him from those duties. But it does not follow, that such a person may not rightfully be enrolled. So long as his infirmity is invisible, and unknown to the commanding officer, it is the duty of the latter to enroll him. The statute can admit of no other sensible or just construction. And this is rendered still more evident, when we find that such a case is contemplated and provided for. It is enacted by the 8th section, that "no non-commissioned officer or private shall be disenrolled from the militia for disability, without a certificate from the regimental surgeon, or surgeon's mate, to the acceptance of the commissioned officers of their respective companies." Here is a provision for becoming disenrolled, which can be applicable to those only, who are laboring under permanent infirmity; and no distinction is made between persons thus affected previous to enrollment, and those who afterwards become so. If the plaintiff was affected with the infirmity which he offered to prove, it was not apparent to others, nor had the defendant, Stockwell, any notice of it, until after the plaintiff had been enrolled and dealt with as one of the company. Therefore it cannot now avail him for the purpose of avoiding the enrollment *ab initio*, though it should furnish sufficient cause for a disenrollment. In the mean time the plaintiff became subject, like others of the company, to the military jurisdiction conferred by the statute. Cases are cited from Massachusetts, to show that evidence of the plaintiff's disability ought to have been received. But the extent of their application will readily appear, from a brief notice of the regulations adopted by that State on these subjects. They have a different course of proceeding for this kind of forfeitures, which to some may appear preferable to the summary and final process authorised by our law. The clerk of each company is there the proper officer to prosecute for fines of this description. And it appears by the cases to which we are referred, of *Howe v. Gregory*, 1 Mass. 81, and *Commonwealth v. Fitz*, 11 Mass. 540, that in such prosecution by the clerk, evidence of bodily infirmity is admissible, though the party may have neglected to make an excuse to his commanding officer, as the statute required, or may have made it unsuccessfully. The excuse would seem to be enjoined as a measure of mere prudence, to prevent the inconvenience of an unjust or groundless prosecution; not as an appeal to any judicial authority. In this respect our system is

entirely different; it being settled by the case of *Mower v. Allen and Bateman*, 1 Chip. 381, that, in imposing and remitting fines, militia officers act judicially, and that their final decisions are conclusive. In another view the cases cited are equally inapplicable to the present. There the question arose in a direct prosecution for the penalty; whereas it now arises in a distinct and collateral action. The evidence was correctly excluded.

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The next question arises under the 35th section of the act, which authorises the person amerced to apply to a field officer of the regiment, for a discharge or remission of the fine. The plaintiff made such an application. And it is urged that the process for collecting the fine was legally suspended, so long as the field officer saw fit to hold the subject under consideration. This depends on the question, whether the statute, in this particular, is merely directory to the officer. The rule on this subject is very clearly and correctly stated by MARCY, J. in *The People v. Allen*, 6 Wend. 486. He says "that where a statute specifies the time, within which a public officer is to perform an official act, regarding the rights and duties of others, it will be considered as *directory* merely, unless the nature of the act to be performed, or the language used by the legislature, shew that the designation of the time was intended as a limitation of the power of the officer." According to the text here given, the question raised admits of no doubt. The statute allows the delinquent six days, within which to make the application, after being served with notice of the amercement. It then directs that "the said field-officer shall thereupon notify the captain or commanding officer of the company, to which such delinquent belongs, of the time and place when he will hear the excuse of such delinquent, which shall be within six days from the time application shall be first made, and request the commanding officer to appear and show cause," &c.——"And the said field-officer may, if he thinks proper, at the time of hearing said excuse, give further time for hearing the same, not exceeding six days from the time first appointed; and said field-officer may or may not remit said fine, as the circumstances of the case may require." The power thus vested in the field-officer is not strictly an appellate power, since the right of issuing final process in the case is not given him. If he thinks proper to remit the fine, the proceedings are at an end; but if not, execution

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issues from the commanding officer of the company, founded on the amercement, as made by him. It is more properly a power of check or restraint upon the latter officer, operating to stay proceedings pending before him, but not effectually to transfer them to another jurisdiction. The nature of the power, therefore, indicates that it should be temporary. If the field-officer has a general discretion to suspend proceedings of this kind, he may defeat the collection of a fine without ever remitting it. The result is, that did the question rest solely upon the former clause of the section, which says that the time for hearing the excuse shall be within six days after application made, we should feel constrained to say, that here was a limitation upon the power of the officer ; and consequently, that his appointment of a distant day for hearing the excuse, was wholly unauthorised. But the express negative words of the latter clause, place the matter beyond all dispute. No statute was ever construed to be merely directory, in opposition to its own direct negative terms. Here was, therefore, no restraint upon the defendant, Stockwell, when he issued the execution, and the same was legally issued.

An attempt was made on trial, to invalidate the warrant issued to the defendant, Foster, as sergeant. We think the evidence offered for that purpose was properly rejected. The practice of signing these warrants in blank, and authorising the captains to fill out and deliver them to the sergeants of their respective companies, we believe to be very general, if not universal. No evil is known to have ever resulted from it. In the case cited to this point of *Burt v. Dimmock*, 11 Pick. 355, the objection was, that the colonel had not even signed the warrant ; but that another person had signed it in his name, under a previous general licence to that effect. And if the defendant, Stockwell, had competent authority to fill and deliver out the warrant, the additional facts, offered to be shown, could be of no legal importance. This authority would imply the right of selecting the proper officer to receive the warrant. And though, by mistake, or otherwise, it might once have been delivered to another person, that fact could not impair its validity as a warrant to Foster, after it had been accepted and acted upon by him. Besides, we may well presume, in the absence of proof to the contrary, that in pursuance of the 8th section of the statute, this warrant had been duly recorded by the adjutant, as having issued to Foster.

But, admitting that the validity of the warrant is left in doubt, we are not prepared to say, that the legality of the plaintiff's commitment is thereby affected. It is a principle of extensive application, that an official act, if regular and correct in the manner of its performance, will be sustained by proof that the person doing the act was an officer *de facto*. The rule is otherwise in proceedings instituted for the purpose of directly trying his right. The defendant, Foster, was at least a sergeant *de facto*, having been duly elected and sworn. *Rex v. Lisle*, 2 Stra. 1091. And without deciding whether this would enable him to act without a warrant in a matter strictly military, and where, perhaps, the warrant might be his only ostensible authority for acting, we think he had authority sufficient for the act complained of; or rather, that the act cannot be impeached for want of authority. His immediate authority for making the commitment was contained in the writ of execution, which in its nature was rather a civil than a military process. And as, in our opinion, the principle just stated would protect a constable or other civil officer in a like case, we see no good reason for denying to Foster the benefit of the rule, at least in this branch of his official duty.

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The remaining objection is to the mode resorted to for enforcing the execution. The plaintiff offered to prove that it might have been satisfied by a levy on property, and without an arrest or commitment of his person. According to the order of proceedings pointed out by the statute, directing the mode of levying executions, the officer is first to demand payment of the debtor, or at the place of his abode, and then the right of arresting the person is postponed to that of seizing property. As to the first step prescribed, it is well settled, that the statute is merely *directory*. *Eastman v. Curtis*, 4 Vt. Rep. 616.—*Dow v. Smith*, 6 Vt. Rep. 519. The other part of the enactment affects the personal liberty of the debtor, and, for any wanton violation of the right intended to be secured to him, he is certainly entitled to redress. But too strict a hand must not be laid upon the officer. Whenever he takes property, unless specially directed by the creditor, he acts upon hazards against which he has no indemnity. A liberal scope should be allowed him for the exercise of honest judgment and discretion. If he commits the debtor in disregard of his right, without any apparent necessity for so doing, and from motives of oppression or

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malice, he ought to be answerable for all damages, and not otherwise. It would, therefore, seem that the debtor's remedy should be sought in a distinct action against the officer. Indeed, the decisions, already made on the first requirement of the act, appear, in principle, to cover the ground now taken. The court say, in *Dow v. Smith*, before cited, that "the only practicable course is, to treat the officer's proceedings as good; and if his disregard of this directory statute is without excuse, malicious, and productive of injury to the debtor, let redress be had by an action on the case therefor against him."

There is another feature in this part of the case, which would go far to remove the objection taken, were it necessary to rely upon it. The complaint is, that the officer should have levied on property. But to entitle this complaint to consideration, it should appear that the debtor was ready to acquiesce in the taking of his property. In this instance, however, the plaintiff did not intend to acquiesce; but gave the defendants to understand that they would be visited with an action, for any attempt to enforce the execution.

On the whole, we consider that the justification was made out, and that the judgment below must be affirmed.

Judgment of County Court affirmed.

CHITTENDEN COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

" SAMUEL S. PHELPS,	} <i>Assistant Justices.</i>
" JACOB COLLAMER,	
" ISAAC F. REDFIELD,	

TOWN OF HINESBURGH v. JOHN R. SUMNER & LUMAN E. LOVELAND.

*Chittenden,
January,
1837.*

A note given, in whole or in part, for the compounding of penalties, or suppressing of criminal prosecutions is void and uncollectable.

THIS was an action of assumpsit upon a note of hand, dated November 10th, 1834, signed by said Sumner, as principal, and said Loveland, as surety, payable to the town Treasurer of Hinesburgh. The defendants pleaded the general issue and two pleas in bar, one of duress of imprisonment, and the other, that the defendants were induced to give the note to stifle a criminal prosecution. On the trial, the defendants offered to prove, that, before the said 10th day of November, two prosecutions had been commenced by the town grand juror against Sumner, for retailing liquor without licence,—under the statute of 1833, giving penalties, for the breach of said act, to the town—one of which had been tried before a justice of the peace, and a verdict and judgment rendered thereon against said Sumner, from which he appealed to the County Court; that on said 10th day of November, Sumner gave judgment on the other and appealed; that the town grand juror then said to Sumner, that, unless he would settle the fines and costs in these two prosecutions, he would have him arrested immediately on two other complaints and warrants, which were then made out and ready to be served; and that said Sumner, under the fear of said war-

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rants, did execute the note in question. This evidence was objected to by the plaintiff, and was rejected by the court. The defendant requested the court to charge the jury, that, after the appeals were taken, the town grand juror had no authority to settle or stop the prosecutions, and that they were beyond his control. But the court refused so to charge, and directed a verdict for the plaintiff. To which the defendants excepted, and the case passed to the Supreme Court.

Wm. P. Briggs, for the defendants.—Contended, 1st. That an error was committed by the court below, in not permitting proof that a part of the inducement or consideration for giving the note was the stifling of criminal prosecutions, because, if so, the note was void. 2 Wils. 341. 5 Dane's Dig. 169.

2. That the defendants should have been permitted to prove that the note in question was given under a menace of imprisonment, which is duress. 2 Inst. 483. 2 Roll. Abr. 124. 5 Dane's Dig. 373. 7 id. 1.

3. The grand juror of a town has no authority to settle prosecutions for offences against our criminal, or penal laws, and take notes for the fines and costs, at any time; much less, after an appeal has been taken. See R. Statute p. 421 and 422. And, more especially, in this case. Because, 1st. had the prosecution proceeded to final judgment in the county court, and respondent been convicted, in that case the fine would be the property of the State and belong to its treasury. 2nd. because it is against a sound and healthful administration of criminal justice to permit mere informing officers to compound offences against the laws. *Joseph Swazy v. Daniel Mead*, Orleans Supreme court, 1834. All contracts are void when it is contrary to the good policy of the State to enforce them. 5 Dane's Dig. 168. and the authorities there cited. 7 id. 1. as to compounding offences.

C. Adams for plaintiff.—1. The evidence rejected was offered to maintain the plea of duress, and we insist that it had no tendency to prove this issue.

Duress *per minas* is no defence unless it involve loss of life or limb. 1 Bl. Com. 131. Menacing to commit a battery, burn a house, or spoil goods, is not sufficient to avoid the act. 2 Bac. Ab. 403.

The duress pretended in this case was a threat of imprisonment, but it is not alleged that there was no cause for the im-

prisonment, and, without proof, it is not to be presumed, that the complaint and warrant were groundless. Chittenden, January, 1837.

Actual imprisonment is not duress, unless the imprisonment is without cause or fraudulent, *Watkins v. Baird*, 6 Mass. 506. Town of Hinesburgh v. Jno. R. Sumner and L. E. Loveland.
Anon. 1 Lev. 68.

2. *Charge of the Court.* As an abstract proposition, the charge of the court was unquestionably correct. Grand jurors have power to control prosecutions in their own towns until final judgments. Whether after final judgment they retain authority to discharge it, is a question that does not arise in this case. The appeal in the case offered to be shown had no effect upon the grand juror's authority. In prosecutions for crimes and for penalties payable to the county or State treasurer, the authority of the grand juror ceases, when the suit passes from the justice by appeal or binding over. But in case of penalties, payable to the town, the case is different. States' attorneys have power to collect all fines payable to the State and County treasurers, (St. 557.) but they have nothing to do with fines payable to the towns. The latter are to be collected at the expense of the towns, and the suits must be prosecuted by the grand juror, in his own person or by his attorney.

By the act of 1833, relative to retailers, the penalties were payable to the towns, and the town grand jurors were made prosecuting officers. In the previous acts, relative to retailers and tavern keepers, the fines were collectable on *information* or *indictment*. But the act of 1833 is silent as to the manner of collecting the fines, and, consequently, an action of debt would lie. 2 Bac. Abr. 280. Whether the prosecution, offered to be shown, was in debt or otherwise, does not appear.

One of the singularities of the exceptions, is, that the court were requested to charge as to the effect of evidence, which had been rejected. No evidence was admitted, nor offered, as to the consideration. Had the case admitted it, the defendants, under the general issue, might have shown a want of consideration, but this was not attempted. They offered to show that the note was executed under fear occasioned by threats, and this evidence was rejected, and then the case rested.

The execution of the note having been admitted or proved, the burden of impeaching it was thrown upon defendants. That a legal discharge of judgments would be a good consideration for the note, cannot be doubted. Our statute, (p. 235)

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directs that persons convicted of penalties shall pay or *give security*, and the note may be considered in that light, even without a discharge, and leaving the judgments to be satisfied by payment of the note.

It might have been competent for defendants to show that the judgments were not discharged, or that the discharge was by one unauthorized, in which case the court would have decided as to the effect of it, but no evidence of that kind was offered.

COLLAMER, J. delivered the opinion of the court.

In assumption, it may now be considered as settled, that every defence, except tender, and the statute of limitations, may be given in evidence under the general issue. If, therefore, the evidence offered by the defendants, constituted or tended to prove any legal defence, it should have been admitted, as the general issue was pleaded. It is true, the testimony did not tend to prove duress, as no *unlawful imprisonment* was either suffered or threatened. The grand juror was the prosecuting officer for these penalties to final judgment, and he had power to receive the amount of the fine and cost, and discharge the prosecutions, or to enter a *nolle prosequi*. However it may be considered in England, in relation to notes, as commercial paper, we, in this case, and as between the original parties to this note, consider it, under our law, open to all objection in relation to its consideration or inception. The compounding of penalties is an offence at common law, of dangerous tendency, highly derogatory to public example, and prosecutions are no more to be improperly suppressed by public informing officers, than by common informers. And all bonds or notes, into the consideration of which the compounding of a penalty, or the suppression of a prosecution therefor, in any part enters, are void and uncollectable. The officer has a right to receive the amount of the fine and cost and pay it into the public treasury, and were that all there was of this note, inasmuch as the town treasurer has received it, it might be good and collectable. But it is *contra bonos mores*, and of dangerous tendency, that any prosecuting officer may induce such settlement by using his official influence and power, to threaten with other prosecutions, and to offer to suppress them, in order to procure a settlement of those already commenced and pending. In this case the testimony tended to show, not merely that the two appealed prosecutions were settled, and made up this note, but that two other criminal prosecu-

tions, of what precise character we are not informed, were suppressed as an inducement to the giving of this note.

This is hardly attempted to be justified even by the plaintiff's counsel, in argument. We think the testimony should have been admitted, and the jury instructed, that, if such proposition was made by the officer, and *thereby* the defendants were induced to give this note, they should find for the defendants.

Judgment Reversed.

PHILIPS, J. Dissenting.

AMOS BLODGET *vs.* ABRAM BRINSMAID.

Relationship by affinity ceases upon the dissolution of the marriage which created it.

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This was an action of ejectment, for land in Burlington. On trial, it appeared that in 1833, the defendant, as administrator of the estate of John Collard, recovered this land in ejectment. The plaintiff, in 1835, as the creditor of said Collard, deceased, recovered a judgment against the defendant, as administrator, and took out execution against the goods, chattels and lands of said deceased, and caused the same to be levied on the land in question. The defendant read in evidence a quit claim deed from said Collard to him, dated in 1827, of all his claim, &c. to the towns of Burlington and Essex. This was all the evidence of title given by the defendant. The defendant also proved, that Samuel Hickok, one of the men, appointed by a justice of the peace to appraise said land on the plaintiff's execution, married the sister of said Collard, but that she died many years before this transaction; and insisted that said Hickok was therefore disqualified to act as appraiser, as aforesaid, and so the said levy was insufficient. The court overruled said objection and rendered judgment for the plaintiff; to which the defendant excepted, and the case passed to the supreme court.

J. Maack for the defendant.—The defendant, by virtue of his judgment against Brinsmaid, as administrator of Collard, had no right to levy the execution on the premises in question. The land did not belong to the estate of Collard, but to the defendant, in his own right. The deed of 1827 from Collard, the intestate, to the defendant, which was wholly unquestioned, pro-

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ved that the land belonged to the defendant, in his own right. Though the defendant, in order to recover of Warner the possession, counted in the character of administrator of Collard, that makes no difference. The intestate's deed is conclusive evidence that he had parted with all his interest in it. The probability is, that the counsel, who commenced the original action of ejectment against Warner, supposed this deed would be affected by the act of 1807, Statute, page 171. But that act could not have applied, as Warner claimed under Adams, who made a defective levy of execution in his favor against Collard. Here there was no adverse possession. Suppose the intestate had indorsed a chose in action to defendant, and defendant instead of bringing the suit in his own name, had brought a suit as administrator to recover it, would it therefore be assets, as a matter of course? But there are other fatal objections to the plaintiffs recovering. He claims as an execution creditor, and therefore, if he has not strictly complied with the law, he gained no title. The proceedings of an execution creditor ought to be subject to a "searching operation," and if doubts arise as to his having complied with the requisitions of the statute, those doubts ought to be solved against him. The statute, relating to the levy of executions, prescribes that the appraisers shall be judicious and *disinterested*, &c. Hickok, one of the appraisers, married the sister of the intestate, and has issue by her, living, though she is dead. We contend that Hickok was not a disinterested appraiser between those parties, within the statute. In giving a judicial construction to the qualification "*disinterested*," regard must be had to the nature of the functions the individual was to perform. 1st. Were they merely ministerial? If so, then, perhaps, the term might be limited to a pecuniary interest. But here they were not ministerial, but partaking of the nature of judicial duties. The appraisers were to exercise their judgment. It is a cardinal principle in the administration of justice, that all, who are to decide controversies and determine rights between others, shall be *disinterested*, and by this we understand not only that they shall be free from any pecuniary interest, but, also, that they shall not be of kin or connection to either of the parties. The statute has disqualified all standing within the fourth degree of consanguinity or affinity. Stat. p. 131. Sect. 23, and in other places.

It is true the Statute, now in question, has not determined

how near or distant the relationship may or must be, but, in the silence of the Statute, the court must adopt a rule. It is manifest that a father would not be a legal appraiser for the son, or a son for the father, or a brother for a brother ; therefore, relationship renders the appraiser interested, and disqualifies him. We must recur to the probable intention of the legislature, and to the general system of legislation, on matters coming within the scope of the principle. 1 Mass. 146—3 do. 21—8 do. 423—18 do. 254.

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The legislature, then, having enacted that those, standing within the fourth degree of consanguinity or affinity, are incompetent to act in a judicial capacity, their intention undoubtedly was to apply the same rule to this case. It is objected, however, that Mrs. Hickok is dead, and, therefore, the objection ceases. Even had she died without issue, still Hickok would not be a competent appraiser, but as she died leaving issue, who are still living, and who are heirs to Collard's estate, the objection remains in full force.

Again, it is said we ought not to complain, as the presumption is, that, if the appraiser had any bias, it was in our favor. It however makes no difference, the law makes the appraiser incompetent, and we have waived nothing.

C. Adams for plaintiff.—I. The recovery by Brinsmaid, as administrator of Collard, in his suit against Isaac Warner, was *prima facie* evidence that the land, thus recovered, was assets in the hands of Brinsmaid.

II. The deed from Collard to Brinsmaid was not competent evidence to rebut the presumption.

This identical question was decided in the suit between these parties, January term, 1835. On a plea of no assets of Collard, this same deed was offered and rejected, and the court, on exceptions, affirmed the decision. This question, then, as between these parties, is at rest.

III. Hickok was a disinterested appraiser. He was not related to either of the parties. He was not related to Collard, for though he once married Collard's sister, she had been long dead.

IV. If the administrator, with a deed in his pocket, still chooses to claim the land, as administrator, he is bound by his election, and is estopped by his recovery from any claim of right in himself.

The court will, also, be slow in favoring a party, who inten-

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tionally suppresses the evidence of his title for years, and, by this suppression, seeks to gain an advantage.

COLLAMER, J. The only claim to this land, by defendant, was his deed of 1827. The effect of this evidence was fully passed upon by this court, two years since. It was then decided, that *this evidence alone* could not enable defendant to hold this land, in his own right, against the legal presumption arising from the judgment, which the defendant recovered for this land, as the administrator of Collard. *First*, Because the legal presumption would be, that the recovery by the administrator was upon a title obtained by Collard after 1827. *Secondly*, There was no testimony tending to explain why the defendant, while he owned this land, in his own right, actually brought ejectment for it, as the property of Collard, and recovered it, as his administrator. The same question is again presented, and the defendant puts in the same testimony, and no more. The decision must be the same. *Blodget v. Brinsmaid, administrator*, (7 Vt. Rep. 10.)

It is, however, insisted, that the plaintiff cannot recover, because Hickok, one of the appraisers on the plaintiff's execution, formerly married the sister of Collard, she being long since dead. The statute provides that the appraisers shall be "judicious and disinterested freeholders." The word *disinterested*, as here used, in relation to the performance of a *judicial* duty, we consider as meaning something more than being devoid of *pecuniary* interest. The appraisers should stand in no such relation to either party as would disqualify them for the execution of judicial power, between them. Was Hickok, when acting as appraiser, related to Collard, by consanguinity or *affinity*? Consanguinity is the having the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the *consanguinei* of the other party to the marriage, but in such case, these respective *consanguinei* do not become related, by affinity, to each other. In this respect, these modes of relationship are dissimilar. 1 Bla. Com. ch. 15. Page 434. Christian's notes to do. 15 Viner's Abr. 256.

The relationship, by consanguinity, is, in its nature, incapable of dissolution, but the relationship, by affinity, ceases with the dissolution of the marriage, which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister. Such is the law of this State, whatever may be the statute of Hen. 8.

Judgment Affirmed.

ABRAHAM BRINSMAID, Administrator of JOHN COLLARD v. NA-
THANIEL MAYO. Chittenden,
January,
1837.

In an action of account against one, as tenant in common of lands, counting upon the Statute remedy, the declaration must set forth the particular interest and estate of each party, in the land, and must allege, directly, that defendant has received more than his just share of the profits of the estate, or it will be bad on demurrer.

A plea in bar to such action, in the name of an administrator, setting forth that the intestate had parted with all interest in the land, before his decease, by conveying the same to the present plaintiff, is good for so much of the declaration as claims to recover of defendant, as bailiff of plaintiff, in his representative capacity.

Matter of estoppel must be so pleaded, or it will be considered as waived.

Account will not lie to recover damages, as for a tort.

A plea in bar, that plaintiff has recovered the same lands in ejectment, and damages for the use, will be good in an action of account, for all the time subsequent to the disseizin alleged, and found in the former action.

THIS was an action of account, wherein the plaintiff declares in two counts. First, Claiming an account of the defendant of certain lands, which he occupied during the life time of the intestate, as tenant in common with him; and, Second, For having occupied the same lands since the decease of Collard. Neither count in the declaration alleges that Collard was seized of one moiety, or of any other portion of the estate, but only that defendant was seized, as tenant in common with plaintiff, of one moiety, and was in one instance bailiff of Collard, and in the other of Brinsmaid and bound to render a just account of rents and profits, which he should receive more than his just share, and then alleges that he refused to render any account, without alleging that he had received more than his just share. The declaration concludes *contra formam statuti*. The defendant pleads, 1st. That Collard had conveyed all his interest in the premises to plaintiff, Brinsmaid, in his life time by deed, signed, sealed, well executed, acknowledged and delivered, and that, at the time of his decease, he had no interest whatever, in the premises. To this plea there is a general demurrer.

2. The defendant pleads that the said Collard, in his life time, commenced his action of ejectment, for the recovery of the same land, which was pending, at the time of his decease, and prosecuted by plaintiff, as administrator, to final judgment, in which the land was recovered and damages for rents and profits; and so the same matter has been adjudicated.

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lard

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To this, the plaintiff replies, that defendant, in that action, filed his declaration for betterments, and recovered \$150, which was allowed by the court, and paid by plaintiff, and that the judgment in plaintiff's favor did not include the use, rents and profits of this land.

To this replication there is a general demurrer and joinder in both cases. The County Court rendered judgment for the defendant. To this decision, plaintiff excepts and exceptions allowed, and the case comes here for revision.

C. Adams, for defendants.—I. The admission, that Collard had conveyed all his interest in the land, is a perfect bar to all claim, made in the first count.

The allegation here is, that defendant was tenant in common with plaintiff, as administrator of Collard. But if Collard, at his death, had no title, nor interest in the land, there was nothing, of which they could be tenants in common.

II. By the pleadings to the second count, it is admitted that there was a recovery in March, 1830, in the ejectment brought originally by Collard, that the damages have been paid, and that plaintiff, as administrator, had taken possession.

The statute provides, (page 85) that the plaintiff in ejectment shall recover his damages, as well as the possession. This, then, is a bar to all claim, up to the recovery. *Burton v. Austin, et al.* 4 Vt. Rep. 105.

III. If, after the recovery, defendant had remained in possession, plaintiff could not recover in this count, but must count upon a tenancy with him, either in his own right, or as administrator of Collard.

IV. But the replication to the plea to the second count is defective.

1. It introduces various new matters, and, without even professing to traverse the plea, concludes to the jury.

2. It neither answers nor traverses the plea.

3. It is a departure from the writ the writ alleging a tenancy with Collard, from September 9, 1826, to June 1, 1829, and the replication, in effect, alleging a tenancy from March, 1830, to April, 1833.

4. For *duplicité*, in setting out the nature of the recovery against defendant, the claim of the defendant, in his bill for betterments, the extent of the possession, by the defendant, and also, the limitation of the possession of the plaintiff, under his writ of possession.

5. It is confused and multifarious, comprehending a variety of distinct matters, having no legal connexion, and wholly irrelevant.

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V. The declaration is also defective.

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1. It is not alleged in either count, that any title existed in the plaintiff, nor that the defendant has received any more than his share, and, by the authorities, both are necessary. 1 Bac. Ab. 32. 3 Chitty Pl. 579. *Wheeler v. Horne*, Willes, 208.

2. By the common law, account would not lie between tenants in common, unless plaintiff had actually constituted defendant his bailiff. Co. Lit. 172, a. Idem. 200. B. 1 Bac. Abr. 31.

3. Our statute (p. 142) is similar to the English statute, giving an action of account, where defendant *has received more than his proportion*.

4. In the second count there is a strange jumble, that defendant was tenant in common with Collard, and, as bailiff of Brinsmaid, administrator, was bound to render an account thereof to Collard.

H. Leavenworth, for plaintiff.—Argued, 1st. That the deed from Collard to Brinsmaid does not affect Brinsmaid as administrator. *Blodget v. Brinsmaid, Administrator of Collard*, 7 Vt. Rep. 1.

2. The action of ejectment, which this plaintiff brought against the defendant, did not include any thing for the use of the land, as the damages in it were only nominal, which appears from the record, and the plaintiff was kept out of possession by the declaration for betterments, and did not get possession until April, 1833, which also appears of record.

3. The introduction of the declaration for betterments, in the plaintiff's replication, is not new matter, as it is a part of the same proceeding, set forth in the defendant's plea, and has a direct connection with the action of ejectment, and is a part of the same transaction, and introduced, with other circumstances, to show that the plaintiff did not have the occupancy of the premises.

REDFIELD, J. delivered the opinion of the Court.

The pleadings, as presented to the Court, do not seem to have been settled, with much of that technical precision, which emphatically denominates special pleading to be the science, the language, and the essence of the law. And, indeed, such precision, however desirable, could hardly be expected, in the hurry

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and confusion of a *nisi prius* term. But as it was the desire of the parties, that the Court should pass upon the questions discussed at the bar, we have done it, without much regard to the inartificial manner, in which they are hinted at upon the record.

The second plea in bar is most manifestly not avoided, or in any way affected by the plaintiff's replication. For it could not affect this judgment, or, indeed, the judgment in ejectment, whether the defendant filed his declaration, and recovered for betterments, or not. It might, *in foro conscientie* be entitled to more or less consideration, but could, in no sense, be a ground of confirming or avoiding the judgment in ejectment.

But this was probably intended by the pleader, as merely inducement to that part of the replication, in which plaintiff denies that any recovery was had in the action of ejectment, for the *use* of the land. Whether such recovery was, or was not had in the action of ejectment, is not material, but only whether the question of use was properly *before the Court* in that suit. If so, and the matter was *adjudicated*, it is not material, whether nominal or real damages were assessed. Or if, in any other mode, the judgment in the former suit is an estoppel upon the plaintiff in this case, then the defendant may well rely upon it as such.

It is well settled, that the action of account will only lie where there is a privity of contract, or privity of estate, and will not lie to recover damages, as for a tort. 1 Swift's Dig. 581. And the action of ejectment is founded upon a supposed wrongful disseizin of plaintiff, by the defendant, and will, from its very nature, exclude the possibility of recovery in account or assumpsit for rent, during defendant's occupancy, subsequent to the *ouster*. And unless defendant was plaintiff's bailiff before the *ouster* found, in the action of ejectment, there would not seem to be any sufficient ground for this action. That is not relied upon. Whether after the *ouster*, the recovery in ejectment of nominal damages will conclude the plaintiff's right to recover further damages, it may be sufficient to say, that such has always been the practice of Courts in this State, since the statute giving the plaintiff the right to recover damages, as for *mesne* profits, in ejectment. And such, it is believed, is the general understanding of the profession. It is considered, that that statute has, in this State, merged the action of trespass for *mesne* profits, with the

action of ejectment. And so of course, there could be but one recovery for the same cause of action. This plea in bar would thus seem to be a sufficient answer to the declaration, as it applies to the same time there relied upon.

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The first plea in bar shows that Collard had conveyed the land to Brinsmaid, before his decease, and at the time of his decease, had no interest whatever in the same. This would seem to be a sufficient answer to the plaintiff's claim to recover for the use of the land, since the decease of Collard, in his representative capacity. But it is said that Brinsmaid's recovery, in ejectment, of this same land, as administrator of Collard, estops the defendant to rely upon this plea. That is undoubtedly true. But when an estoppel is a matter of record, and thus capable of being pleaded, and the party has an opportunity of pleading it, it must always be so pleaded, or it will be considered as waived. Here this plea is demurred to generally. And although we might hold in some cases, that a matter of this kind, which was pleaded generally, and not as an estoppel, was conclusive upon the right, nor could we surely do that, when the matter, relied upon, was not even pleaded, except to another part of the case. This plea, then, would seem to be a sufficient answer to that portion of the declaration, which it professes to answer.

In looking into the declaration, we are satisfied it is bad. This is an action of account between tenants in common, of lands, which did not lie, at common law, except upon special appointment of one tenant to be the bailiff of the other, which is not relied upon here. This is a declaration against defendant, as bailiff of the rents of the common land, which he is made liable to account for, in this form of action, by statute. The action is given as between tenants in common. In other words, it is made to depend upon privity of estate. This privity of estate should be distinctly alleged, as the foundation of the action. It is here alleged, that defendant is seized of one moiety, as tenant in common with plaintiff, but it is not alleged that plaintiff or his intestate, were ever seized of the other moiety, and for any thing apparent, there might have been numerous owners of the other moiety, and all tenants in common with each other, and with defendant and plaintiff. For tenants in common may be seized of an equal portion of the common estate.

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How this is, does not appear. If it be as supposed, the only remedy is in Chancery. *Wiswell v. Wilkins*, 4 Vt. Rep. 137.

It is not alleged, except by way of inference, that defendant had received "more than his just share of the profits of the estate," which is the only ground upon which the statute gives the remedy here sought. And the allegation, that the defendant was to account for what he received, more than his just share, and that he refused to account at all, might be very consistent with his not having received more than his just share. Such has been the construction given to the English statute, 4 Anne C. 16., and such we think the only rational construction. *Wheeler v. Horne*, Willes, 208.

The declaration should allege, that the plaintiff and defendant were tenants in common of the estate, setting forth, specifically, of what particular portion each was seized, so that the particular relation of the parties, in regard to their respective interests in the same, could be seen by the Court. And the declaration should allege that defendant had received more than his just share of the profits, within the true intent of the terms of the statute. In both these particulars we think the declaration bad. Upon every ground the defendant is entitled to have judgment. The plaintiff moved for leave to amend. As the case came here by appeal, the judgment below was vacated by the appeal, and leave to amend was granted plaintiff, on terms.

STEPHEN A. GREENO v. MUNSON & MUNSON.

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The tenant cannot dispute the title of his landlord, until he has first *bona fide* surrendered his possession.

The same doctrine extends to mortgagor and mortgagee, trustee and *cestui que trust*, vendor and vendee, and to all other cases, where one is in possession of lands, acknowledging the title of another.

But if the person in possession of lands, under such relation, repudiate the contract, and give the one, under whom he went into possession, notice that he shall no longer hold under him, the relation ceases, the possession becomes adverse, and the statute of limitations begins to run.

But in no other way, can the person in possession of lands, under such relation, ever acquire title against him, under whom he went into possession.

THIS was an action of ejectment for lands, tried on the general issue, before a jury. The land was described as lot No. 4, in the township of Colchester. The plaintiff claimed to recover fifty two and a half acres off of the east end of the lot.

It appeared in evidence, that more than thirty years since, one Benjarnin Boardman was in possession of the land in question, under deed, by the name of the Winslow Pitch, and, that at that time, plaintiff's father, Thomas Greeno, went into possession of the same, under contract of sale of said Boardman's title to him. That afterwards, in 1804, said Boardman deeded to said Thomas Greeno, thirty two acres of said pitch, and, in the year 1811, deeded the remainder to William Munson, whose title is held by defendants. In the year 1834, Thomas Greeno, deeded the thirty two acres to plaintiff. The plaintiff and his father have continued to occupy the whole Winslow pitch, of fifty four acres, until very recently, when the defendants entered into possession of the part deeded to Wm. Munson, and are still in possession of the same, claiming to hold it adversely to plaintiff.

Upon this state of the case, the County Court directed a verdict for defendants, to which decision the plaintiff excepted.

Maack & Whittemore, for plaintiff,—Contended, 1. That the court ought to have instructed the jury, that they might presume a deed to plaintiff's father, from the lapse of thirty-five years, especially, when it appears that he went into possession under a contract to purchase. Such a possession can never be construed as a tenancy, but it is the very case in which a deed ought to be presumed.

2. The plaintiff was protected by the statute of limitations.

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He and those, under whom he claimed, had occupied the premises, in question, more than thirty-five years, and gave evidence to prove that they had claimed the land adversely to all others, during the whole period, and the court should have charged the jury, that the statute made, in such a case, a good title in the plaintiff.

The plaintiff is not estopped to claim by possession, in consequence of taking the deed of 1804. That deed contains no recital of title in Boardman to the remainder of the lot. It admits his title to the thirty-two acres, and nothing further. How then, can his acceptance of the deed, estop him to claim the remainder of the lot by adverse possession, against Boardman or any other pretended owner? *Hazard v. Martin*, 2 Vt. Rep. 77.

3. After the plaintiff had given evidence of an adverse possession, asserted at the time of the deed from Boardman to Wm. Munson, the plaintiff was entitled to a charge from the court, that the deed was void under the Statute of 1807.

C. Adams, for the defendants,—Contended, that if Thomas Greeno went into possession simultaneously with his deed, the deed will control the extent of the possession. If he went into possession first, and without deed, he went in under Boardman, and acknowledging his title, and, without positive evidence, will not be considered as holding adverse to Boardman.

But, whether he took possession before the deed or not, is not material, as a subsequent deed is an admission of title in the grantor, and the claim of the grantee will be limited to the deed.

Possession is never presumed to be adverse, and an entry, under title, will be limited to the extent of the deed conveying the title, and a mere varying from the line, established for convenience, will not operate against the rights of the parties. *Catlin v. Kidder*, 7 Vt. Rep. 12. *Burrell v. Burrell*, 11 Mass. Rep. 294.

There is no ground, from lapse of time, to presume a deed from Boardman to Thomas Greeno. Soon after the deed to Greeno, Boardman conveyed the remainder of the lot to Munson. The deed to Greeno of August, 1804, is sufficient to explain his possession. It does not appear that the parties ascertained the exact extent of the purchase.

The pretence, that the plaintiff can hold by the statute of limitations, is without any foundation. His possession was un-

der his deed, and the extent of the possession must be controlled by the deed.

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It is the common case, where parties holding under their titles accidentally clear over.

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There is no pretence of any adverse possession, and there is nothing, from which a jury would be permitted to infer any claim, beyond the land conveyed by deed.

As Greeno entered under Boardman, if he occupied more than his deed conveyed, he held the remainder as tenant to Boardman. *Barr v. Gratz*, 4 Cond. U. S. Rep. 431.

REDFIELD, J. delivered the opinion of the Court.

The case finds that Boardman went into possession of the land under deed. This possession would then extend to the whole land. When plaintiff's father went into possession under Boardman, his possession would be that of Boardman, and it would remain the possession of Boardman until Thomas Greeno received his deed of the thirty-two acres, unless he did some act to repudiate his tenancy, and thereby become a trespasser. And after the deed to himself of thirty-two acres, if he continued in possession of the remaining portion of the pitch, it would be in subordination to the title of Boardman.

The doctrine of the law of tenure, that the tenant cannot dispute the title of the landlord, is one too long established, to be now brought in question; and it is one of almost universal application. It has been repeatedly recognized by this court, in reported cases. *Tuttle v. Reynolds*, 1 Vt. Rep. 80. *Bowker v. Walker*, 1 Vt. Rep. 19.

The doctrine of the law, alluded to above, has been, by courts, extended to various other relations of tenure, not coming strictly within the definition of a tenancy. Thus, it has always been held, that the mortgagor shall not be heard to dispute the title of the mortgagee, nor the trustee of the *cestui que trust*, nor, in short, shall any one, who goes into possession of land under another, or acknowledging the title of another, be heard to dispute the title of that other, during the continuance of the relation. The same doctrine has been extended to one, who goes into possession of land, under a contract of sale.

Any one going into possession of land under the circumstances named cannot set up any outstanding title, which he may have purchased in, but must, first, *bona fide*, surrender the possession, and bring his action to try that title. *Blight's Lessee*

Chittenden, v. Rochester, 7 Wheaton's Rep. 535. Willison v. Watkins,
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So that as to the twenty-two and a half acres, not included in Boardman's deed to Thomas Greeno, the possession has all along been the possession of Boardman; and when Boardman's title had passed to defendants, they were clearly entitled to hold the land against the plaintiff.

The pretence, on the part of the plaintiff, that he had acquired title to the land, by the statute of limitations, is clearly without foundation. A possession, commenced under a contract of sale, is not an adverse possession, in any sense, nor can the vendee, or any one going in under him, whether knowing the contract of sale or not, ever acquire title, by the statute of limitations, to the land sold, until his possession has been first *bona fide* surrendered, or until he has, by some unequivocal act, repudiated the contract, and this is distinctly known to the vendor.

If, after such determination of the relation, the vendor, *cestui que trust*, mortgagee, or landlord, as the case may be, lies by without asserting any claim of title by ejecting the wrong doer, his right of entry is barred by the statute of limitations, and the title quieted in the adversary. And, in some cases, it has been held that it makes no difference, whether this disclaimer of tenure, by the one in possession, is during the existence of the lease, or other contract, or after it has expired. The unexpired term is forfeited, it is said, and the tenant is *quasi* a trespasser, and immediately liable to action of ejectment without notice to quit, and cannot protect himself in his possession, in any other way, except by title acquired by the statute of limitations. See cases last cited. There is no evidence in the present case, tending to show any such disclaimer of title.

The judgment of the County Court is affirmed.

E. V. SPARHAWK & Others v. The Administrator of OZIAS
BUELL & Others.

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(In Chancery.)

In petitions for rehearing in Chancery, the whole case is open to both parties.

A bequest of "one thousand dollars to the children of ———," creates an estate or interest, in joint tenancy, with the *jus accrescendi*, and where some of the legatees decesses, after the death of the testator, before the recovery of the legacy, the interest vests in the survivors.

One executor is not liable for the *devastavit* of another joint executor, where he never had the control or possession of the funds.

But if both take possession of the goods jointly, or if one, having possession of the goods, suffer them to go into the hands of another executor, who squanders them, both are liable for the waste.

If executors give a joint bond for faithful administration, each is liable for the acts of the others. The statute in force, in the compilation of Tolman's edition of the statutes, requires executors to give a bond for faithful administration; "*in the same manner* administrators were by law required to do," and, under such statute, an executor's bond, providing that the executors shall pay all legacies, is a valid and binding obligation, as coming within the fair intent and meaning of the statute.

The appropriate remedy, for the recovery of a legacy of the executor, by the legatee, is in Chancery.

Such claim is not within any of the statutes of limitation, nor does any presumption of payment, in such case, arise in less time than twenty years, unless corroborated by proof of other circumstances.

Such claim is not barred by not being presented to the commissioners of insolvency, on the estate of the executor, but may still be pursued in Chancery.

A decree of this Court, made to depend upon the performance of a condition *precedent*, is of no force whatever, until such condition is complied with. If an authority be conferred upon condition of the appointee giving security for the faithful discharge of the office, the giving of the security is a condition precedent to the vesting of the authority.

The decrees of probate Courts, within their appropriate jurisdiction, and when the subject matter of the adjudication is sufficiently expressed, will be presumed to have been made upon other sufficient previous proceedings, unless the contrary appear from the records themselves.

The decrees of probate Courts are as conclusive as the orders, sentences, or decrees of any other Court, within their proper sphere of jurisdiction.

But the proceedings of these Courts being in the nature of proceedings *in rem*, they are only conclusive upon matters directly adjudicated, and not

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upon matters collaterally recited. The decree is conclusive for the purpose for which it was made, and no further. In the settlement of an administrator's or executor's account, the decree is conclusive, as to the proper distribution of the estate, but if debts or legacies be credited the executor or administrator, as so much money paid, the creditors or legatees are not thereby concluded. But should the residuary legatee question his right to pay such debt or legacy, the decree will be conclusive.

The age of majority of females, in this State, is fixed by the constitution at eighteen years.

A receipt, not under seal, acknowledging to have received full payment of a debt or legacy, is *prima facie* a bar to the recovery of such debt and may be relied upon as evidence of payment.

But it is competent to give parol evidence to contradict such receipt, and, if it be proved to have been given without consideration, it is of no force, as a defence to the suit.

If one of two or more defendants in Chancery suffer the bill to be taken as confessed, and other defendants answer, and testimony is taken, the wife of the defendant, *defaulted*, cannot testify, on the part of the orators, against the other defendants, on the ground that her testimony tends to charge her husband; for if no decree passes against the defendants answering, none can be had against the defendant, against whom the bill is taken as confessed.

If Chancery have appropriate jurisdiction of the subject matter of the bill, and a defendant be joined, who is ultimately liable for the amount, for which the orator is entitled to a decree, the Court will retain the bill, and pass a decree against the defendant ultimately liable.

An executor is not liable to pay interest on a legacy, due to infant legatees, and no time of payment specified, until guardians are appointed, and the executor is notified of such appointment, unless he has actually received interest on the money, or the money was so invested that he might have received interest without incurring an unreasonable hazard.

The bill in this case states, that on the 29th day of June, 1814, William C. Harrington, of Burlington, made and published his last will and testament, by which he bequeathed to the "children of Phineas Lyman," one thousand dollars, and appointed Lyman King, Ozias Buell, Phineas Lyman, and Isaac R. Harrington, the executors of his will; that the testator deceased, and the executors above named, on the 18th July, 1814, duly proved the will and jointly assumed the trust thereby imposed, and possessed themselves of the testator's personal and real estate to the amount of sixty thousand dollars.

The names of the legatees are Julia B., the wife of Edward V. Sparhawk, Charles Y. Lyman, Mary Jane Lyman, and Sarah M. Lyman, being the orators.

The bill further states, that while the legatees were all minors, under the age of twenty-one years, and when the said Julia B. was of about the age of twenty years, and the said Sarah M. of the age of eighteen years, being in the year 1823, Buell and Phineas Lyman procured the two last named legatees to sign a writing, without knowing its contents, which purported to be a discharge of their portion of said legacy; and that the writing was obtained without any consideration, and by fraud.

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The bill further states, that since the legatees have arrived at full age, they have demanded payment of said legacy of the executors. Bill dated 12th Dec., 1832, and praying a decree of the Court, that the defendants pay the several sums due the legatees.

The bill was taken as confessed against Phineas Lyman and also against Lyman King. Isaac R. Harrington, being out of the State, was not served with process.

Frederick Buell, administrator of Ozias Buell, made answer on the part of his intestate, first insisting that the claim was barred by not having been presented to the commissioners on the estate of said Ozias, which closed on the 18th day of February, 1833, and after all the heirs had come of full age.

The answer admits the bequest, in the manner set forth in the bill, and that the orators are the legatees, as described in the bill; that the defendants were named executors of the will, and proved the same, and took upon themselves the burden of the trust thus imposed. It admits that the testator, William C. Harrington, left a large personal and real estate, and that the executors possessed themselves thereof, severally, and not jointly.

The answer alleges that there was a large debt, exceeding two thousand dollars, due to Phineas Lyman, as allowed by commissioners appointed on said estate, and that he, without the concurrence of the other executors, possessed himself of a large amount of debts, due the estate, and retained in his own hands the amount of said legacy, as, in the capacity of natural guardian of said legatees, he lawfully might do, or else, that he paid said legacies to said legatees, in food, clothing, and education.

The answer further states, that on the 3d day of October, 1822, the executors, being about to make a second account of their proceedings to the probate Court, were, by said Court, required to render a joint account, and that in rendering said account, they credited themselves with the payment of said

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legacy and interest, amounting to \$1207, which said payment, so made by said Lyman, and credited by said executors, was by said Court *adjudged* a good and valid payment of said legacy, and that by said settlement, there was found due from said executors, or in their hands, the sum of \$8281,27, which was by said Court decreed to be paid to the residuary legatees, which was done before the 18th day of March, 1823, and that on that day the probate Court decreed a perpetual *quietus*.

The answer further alleges, that said Phineas is now wholly insolvent, and that there being many of the legatees of said estate, other than these orators, who were infants at the time of the settlement of the estate, the executors petitioned this Court, at their Dec. Term, A. D. 1817, for leave to pay the amount of such legacies to the parents of such children respectively, and said Phineas Lyman being permitted by said Court to appear on the part of his said children, and requesting such decree as was prayed for, the same was by said Court made, and that on payment of such legacies to the parents of the legatees respectively, the executors should thereafter be forever acquit and discharged, the parents being by said decree required to give bonds to Ozias Buell, trustee for that purpose, for the faithful discharge of their duty in that behalf. The answer further alleges, that the said Phineas had, at the time of this decree, money to the full amount of such legacy due his children, over and above the debt due him from said estate, and further, that he neglected to furnish any such security, as by the conditions of said decree of this Court required, insisting upon his right to retain the money, and expend it in the education and support of his children, and as this defendant had not the power, either to compel the giving of the security, or the surrender of the funds, he ought to be held not liable.

The answer further alleges that said Phineas, being at the time of the decease of the testator, and ever since, poor and in such destitute circumstances, as to be unable to maintain his said children in a manner suitable to their degree, he expended the full amount of their respective shares, in the prudent and proper education of the several legatees; that Sarah and Julia, both before, and for a long time after they had arrived at the age of eighteen years, were well knowing that said Phineas was expending their respective shares of said legacy in their education,

beyond his own proper means, and never at any time dissented therefrom.

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The answer further insists, that said Julia was born in the month of November, 1802, and Sarah, in October, 1804, and so became of full age, being more than eighteen years of age before the first day of February, 1823, and that on that day, in consideration of having virtually received their respective shares in said legacy, in the manner above stated, they executed a writing under their hands, acknowledging to have received six hundred dollars in full of such legacy, and admits that nothing was paid them *at the time* of executing the writing, but denies *all* fraud in procuring it; and insists that they each knew it would, and intended it should operate as a discharge of their share in such legacy.

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The answer further alleges, that Charles Y. Lyman, at the age of seventeen, was put in the counting house of Horatio Gates, as a clerk and book-keeper, until he should arrive at the age of twenty-one years, where he received a considerable salary, in all, amounting to more than his share in said legacy, which he was permitted to retain and put to his own use, by the consent of said Phineas, he thereby intending to compensate him for his share in said legacy.

The answer further alleges, that the said Mary Jane was born in the year 1814, and has received her full share of such legacy, in education necessary and suitable to her degree, and beyond the proper means of said Phineas.

The answer further insists, that the cause of action accrued to the orators more than eight years before the bringing of this bill, and that, during all that time, two of the said legatees having been of full age, all right of action is barred by the statute of limitations.

The orators traverse the answer, so far as it alleges that the executors took possession of the estate severally, and not jointly; and that Lyman took possession of said legacy, against the will of said Buell; and that at the time of the testator's decease, Lyman was poor, and all that part which sets up the support and maintenance of the children in discharge of the legacy, and also, that Julia and Maria had discharged their shares in said legacy.

Testimony having been taken, the case came on for hearing before the court, at the December term, A. D. 1834, when the court decreed in favor of the orators, for the full amount of the legacy, and interest on the same, up the time of the decree.

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The defendants having obtained a re-hearing, the case was continued at the January term, 1836, on account of the death of the administrator of Buell; and now, George P. Marsh having been appointed administrator *de bonis non*, and the orators having brought their bill of revivor, the case came on for hearing, on the petition for *rehearing*, at the January term, 1837, one of the orators having in the mean time deceased and no bill of revivor being brought.

Wm. Weston, for orators.—All the matters of defence, contained in the defendant's answer, are stated under the allegation that he is informed and believes they are true. From the nature of the matters thus insisted upon, it will at once appear, that such supposed facts could not be within the *personal* knowledge of Frederick Buell, and the answer being traversed, the only benefit the defendant can derive from such allegations, would be the right of introducing evidence to support them. *Clark's Exrs. v. Van Remsdyk*, 9 Cranch, 153. Same case 3 U. S. Cond. Rep. 319. *Atwater v. Fowler*, 1 Edward's Ch. Rep. 417. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 88, and note.

It would have been the joint, as well as the several duty of the executors to pay the legatees, at the expiration of one year, after the testator's death, had the legatees been competent to receive their portions and execute valid discharges to the executors.

But as the legatees were all minors, the executors, as faithful trustees, ought to have secured the amount of the legacy to the legatees, that they might have received the same, with interest, on their arriving severally at full age. And this was as much the duty of Buell, as of Lyman.

Buell was the acting executor. He had most of the assets in his own hands, and was specially directed as to the payment of this and other legacies by the decree of the court of Chancery, made in 1818.

II. Although one executor is not liable for the devastavit of his co-executor, yet, if one executor possesses assets, and passes them into the hands of a co-executor, who wastes them, both are liable. So if one executor concurs in a misapplication of his co-executor, both are liable. So if they act as joint executors, and where two join in a receipt for money, which comes to the hands of one who wastes it, both are liable. *Sadler v. Hobbs*, 2 Bro. 114. *Scurfield v. Howes*, 3 Bro. 90. *Joy v. Campbell*, 1 Sch. & Lef. 328, 340. *Langford v. Gascoyne*, 11 Ves. 333. *Shipbrooke v. Hinchinbrooke* 11 Ves. 252.

Same case, 16 Ves. 477. *Brice v. Stokes*, 11 Ves. 319. *Chittenden, January, 1837.*
Crosse v. Smith, 7 East. 246. *Underwood v. Stevens*, 1 Mer. 712. *Monell v. Monell* 5 Johns. Ch. R. 283. *Doyle v. Sparhawk & Others.*
Blake, 2 Sch. & Lef. 229. *v. Admr. of Osnas Buell and Others.*

Where executors give a joint bond, one is liable for the devastavit of the other. 1 Swift Dig. 449. *Brazier v. Clark*, 5 Pick. 96.

III. The act of Phineas Lyman, in appropriating the legacy to himself, if regarded as a payment, (as the defendant insists) must be regarded in this wise—

Phineas Lyman, as executor, pays Phineas Lyman, as parent, the legacy in question, and we contend that such payment is void. Toller, on Executors, 314. *Rotheram v. Fanshaw*, 3 Atk. 629. *Horrell v. Waldron*, 1 Vern. 26. *Genet v. Talmadge*, 1 Johns. 3. *Williams v. Storrs*, 6 Johns. 353. *Miles v. Boyden*, 3 Pick. 213. In *Dagley v. Tolferry*, 1 P. Wms. 286, where the legatee had rested fifteen years after payment to the father, the Chancellor decreed the payment again. Same case, 1 Eq. Cas. 300.

IV. The filing of the separate accounts of Lyman and Buell, in the probate office, wherein Lyman credits the estate for this legacy, and the same having been allowed by the Judge, can have no effect upon the case, as that act of the probate court was subsequently annulled, in requiring of the executors to render a joint account.

Neither can the allowance of the joint account of the executors by the probate court, wherein this legacy is *falsely represented to have been paid in pursuance of the decree of the court of Chancery*, be a bar to the orator's claim. -

The decree was made without notice. This appears upon the face of the record, and hence it could not bind those who did not appear. Toller, 492

The orators were not bound to appear and object to the allowance of the executors account in order to save their rights. Toller, 494. *Beatty v. State of Maryland*, 7 Cranch, 281.

The accounts of the executors were examined for the purpose of ascertaining the amount to be paid over to the residuary legatees, and, whether the item respecting this legacy had been for so much retained by the executors, to be paid; or that such a sum had been paid, the decree would have been made, allowing the account, for the result would have been the same

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to the residuary legatees, who were entitled to nothing more than the residue, after the other legatees were paid or provided for.

Probate courts are courts of limited jurisdiction, deriving their whole power from the statute ; and if it appear from the face of their proceedings, that they have exceeded their power, their orders and decrees are void. *Hunt v. Hapgood*, 4 Mass. 117. *Sumner v. Parker*, 7 Mass. 79. *Hardwick v. Cleaveland*, 2 Vt. Rep. 329.

This is not a claim against the testator's estate, that required adjudication by commissioners.

The claim is established the moment the will is proved, and if the estate is solvent, and the executors receive assets, they, from that moment, become the trustees of the legatees, and our statute gives no power to the probate court to compel the legatees or *cestui que trust*, to litigate their claims in that court.

V. That part of the defendant's answer, in which he alleges that Lyman expended the legacy in the maintenance of his children, "conceiving that he had a right so to do," is wholly unsupported by the evidence.

The petition of the executors, brought before this court in 1817, states that this legacy, among others, remained unpaid.

The testimony shows conclusively, that Lyman was of sufficient ability to support and educate his children in the manner they were educated and supported.

Lyman continued to support his family until he failed in 1823 or 1824. Since then, they have supported themselves and assisted to support him, and such is the evidence.

The amount of wages received by Charles could not much exceed his expenditures, but whether they did or not, as Lyman never intended that the amount so received should be a matter of account between himself and Charles, it is not a matter that ought to be enquired into now. *Chase v. Elkins*, 2 Vt. Rep. 290. *Whiting v. Earle and Trustee* 3 Pick. 201.

It is the duty of parents to educate and support their children, and, while the father is able to do so, their separate property cannot be appropriated to their support. *Reeves' Dom. Rel. Ch. 9. p. 283. 1 Bla. Com. 446. Toller, 326.*

The allegation that Lyman thus expended the legacy, "professing to act under the decree of the court," has no foundation in truth ; to say that the decree was a permission to Lyman to

expend the money, as contended by the defendant, is a perversion of its meaning.

The petition, although stated to be for the benefit of the legatees, as well as of the executors, was, in fact, brought by the executors for their own benefit.

As Lyman never made any claim against his children for their maintenance, Buell ought not to be permitted to do so.

If he had, in fact, appropriated the legacy to the maintenance of his children, and such appropriation were to be regarded as payment, we insist that payment of a legacy to an infant is void. *Davies v. Austin*, 3 Bro. C. R. 178. Same case, 1 Ves. 249. *Lee v. Brown*, 4 Ves. 362.

If he wrongfully received or appropriated the money, he stands as a debtor to the estate, and if Buell is allowed to set off against the legacy the childrens' maintenance, it would be compelling the children to pay their father's debt.

This is not a case where a claim for maintenance ought to be allowed, were Lyman to make the claim himself.

The former rule in England was, that in no case, where property had been given by a stranger to infants, could it be broken in upon during the life of the father, for their support. *Andrews v. Partington*, 3 Bro. 60. *Mundy v. Howe*, 4 Bro. 224. *Hughs v. Hughs*, 1 Bro. 387. *Butler v. Butler*, 3 Atk. 60. *Darley v. Darley*, 3 Atk. 399.

The rule was afterwards changed so far as to allow the interest, and, in extreme cases, the principal of the infants' property to be appropriated to his support, when the father was unable to support his child, or when the child's estate was large and the parent's estate small. *Greenwell v. Greenwell*, 5 Ves. 195, and cases there cited in note. *Chambers v. Goldwin*, 11 Ves. 1. *Sherwood v. Smith*, 6 Ves. 454. But see case *Ex parte Bond*, 8 Cond. Eng. Ch. Rep. 73, where the modern rule is refused, and the former rule adhered to. But each case is decided upon the particular circumstances attending it.

We doubt whether such a decision, as the one made in the case of lord Petre, would have been made in England, had the parties been *tradesmen* instead of *nobles*, and until Dukes and Lords become as powerful in the United States as they are in England, we do not apprehend that such decisions will be recognized by our courts, as a part of "the common law of England, applicable to our situation and circumstances."

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VI. The statute of limitations does not apply to a legacy.
Higgins v. Crawford, 2 Ves. jr. 571. *Parker v. Ash*, 1 Vern.
256. *Arden v. Arden*, 1 Johns. 313. *Decouche v. Savetier*,
3 Johns. 190, 217.

But we insist that no action at law could be maintained.
Fonb. Equity, 565 and note. *Wind v. Jekyl*, 1 P. Wms. 575.
Deeks v. Strutt, 5 Term. Rep. 690. *Farwell v. Jacobs*, 4
Mass. Rep. 634.

This is the doctrine established in England, and since the
case of *Deeks v. Strutt*, no case is to be found where a legatee
has attempted to enforce his claim at law.

In New York and Massachusetts, and Pennsylvania, an action
at law is given by statute.

In this State, our statute gives no such action ; but, on the con-
trary, where an estate is represented insolvent, it enacts that *no*
action shall be commenced against any executor or administra-
tor, except in certain cases therein excepted. Stat. p. 355. S.
97, and this is not a case within the exceptions of the statute.

2. If the claim could have been enforced at law, we are
not barred by the statute, for our remedy upon the probate bond
is not within the statute.

This question was so decided by the Supreme Court in Frank-
lin county, in the case of the probate court against Chandler, 7
Vt. Rep. 111.

The defendant contends that the bond is void, not being in
conformity with the statute.

The bond, we say, *is* in conformity with the statute. Old
Stat. Vol. 1 124. S. 16, enacts, "That every executor or ex-
ecutrix shall give bond to the Judge of probate, with sufficient
surety or sureties, to return, upon oath, a true and perfect in-
ventory of the estate of the testator into the probate office,
within such time as the Judge of probate shall direct, and to
render an account of his or her proceedings thereon in the
same manner as administrators are by law obliged to do."

The same statute also enacts, p. 129. S. 26, "that adminis-
trators shall give bond," &c. and prescribes the form of the con-
dition, and after stating the manner, in which the administrator
shall inventory the estate in the probate office, proceeds in the
words following—"and the same goods, chattels, rights, credits
and estate of the said deceased, &c. do well and truly admin-
ister according to law, and further do make or cause to be
made, a true and just account of said administration," &c.

Now let us see what bond executors must give to comply with the statute.

They must give a bond that they will make a true and just account of a faithful administration, *according to law*; this clearly implies, that they must first *faithfully administer according to law*, for otherwise they could not render such an account; consequently, the condition of the bond must be *for a faithful administration according to law*, for without such a condition, the subsequent one, "that he would render a true and just account of said administration," would be nugatory; and, as the statute does not prescribe the form of the executor's bond, but only the substance, we are to examine the bond given in the present case, to ascertain whether the substance of the statute has been complied with or not.

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The bond corresponds precisely with the form given in Fessenden's book of forms, p. 325.

In the case of *Seymour v. Beach*, 4 Vt. Rep. 493, a levy of an execution is sustained, being in the form prescribed by Judge Chipman, although the levy under that form, is evidently bad.

We are aware that it has been decided in the English courts, that where some covenants or conditions are void at common law, and others good, a bond for the performance of all is good, so far as respects the covenants that are good, but otherwise, if any of the covenants or conditions are made void by statute. *Willes, Rep. 571.*

It cannot be contended that there is any thing in this bond that makes it void, either by common law or by statute, and if the executors saw fit to give this bond in preference to following the statute more precisely than they have done, it is good as a voluntary bond. *Town of Pawlet v. Strong*, 2 Vt. Rep. 442. *Thomas, Judge, v. White*, 12 Mass. Rep. 367. *Clap v. Guild*, 8 Mass. 153. *Arnold v. Allen*, 8 Mass. 147. *Morse v. Hodgson*, 5 Mass. 314. *Hall, Judge, v. McKay*, 9 Pick. 395.

This is not a bond for ease and favor, therefore, the case reported in Chipman's Rep. 47, is not in point. See *Bache et al. v. Proctor*, 1 Doug. 382.

But we contend, that the qualifying clause of the sentence, viz. "in the same manner as administrators are by law obliged to do," by the grammatical construction of the sentence, applies to the character of the *bond*, and not of the accounting. The executor is to give a bond to return an inventory and to render

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an account in the same manner as administrators are by law obliged to do.

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This view of the statute suggests two remarks :

1. That it contains no *specific form* for an executor's bond.
2. That it refers to the form of an administrator's bond in Sec. 26, as the guide for an executor's bond.

It does not require the latter to be made in the same *form*, for the term would imply the adoption of the same words, which would be absurd, since the duties of administrators and executors differ in some essential particulars. It therefore requires an executor to give his bond in the same "*manner*" as administrators are obliged by law to give their bonds, employing a term, requiring the insertion of every condition common to both, and authorizing the omission of duties not applicable to an executor's office.

The clause of the bond, objected to in the present case, was, therefore, rendered necessary to be inserted, by both the spirit and the plain words of the statute, and this view of the statute is sustained by the case of *Hall, Judge, v. McKay*, 9 Pick. 395.

The statute, under which the bond in the present case was given, was copied almost verbatim from the Massachusetts statute.

VII. The orators further insist, that this suit could not have been prosecuted before the commissioners upon the estate of Ozias Buell, it being a matter cognizable only in a court of Chancery, and the authorities above cited, under the 6th point, fully sustain this position. The statute, requiring all claims to be presented to commissioners, can only have reference to claims that can be enforced at law ; the proceedings before commissioners are proceedings at law. They have no chancery powers, and an appeal is allowed from their decision to the County Court.

2. The bond being a joint and several one, if either of the sureties were compelled to pay, the surety could recover of Buell's administrator, or heirs, such amount, in an action for indemnity. *Babcock v. Hubbard et al.* 2 Conn. Rep. 536.

If the orators' claim could be eventually established and collected out of Buell's estate, shall they be turned out of court upon a technical objection ? for it cannot be viewed in any other light. Had the claim been presented to the commissioners, we should have been compelled to resort to chancery for a final de-

cision; for it is evident, from the whole case, that a court of Chittenden, January, 1837.

Then ought this court to refuse to proceed with it, because we come to the fountain of justice in the first instance, instead of coming in by some of its tributary streams? Sperhawk
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VIII. The orators insist that the discharge, or receipt, given by Julia and Maria, was fraudulently obtained, without consideration, and, therefore, void.

A discharge given by a child, on his arrival at full age, to a parent, or to one standing in *loco parentis*, upon an inadequate consideration, is held void on the ground of the influence the parent is supposed to have over his child. *Hawes v. Wyatt*, 2 Bro. 156. *Cocking v. Pratt*, 1 Ves. Sen. 400. *Brace v. Taylor*, 2 Atk. 254. *Huron v. Huron*, 2 Atk. 160. *Hylton v. Hylton*, 2 Ves. Sen. 548. *Hatch v. Hatch*, 9 Ves. Jr. 292.

So a conveyance, obtained from persons uninformed of their rights, will be set aside, though there be no actual fraud. *Evans v. Lewellyn*, 2 Bro. 151. *Murray v. Palmer*, 2 Sch. and Lef. 474, 485, 486.

We further insist, that, at the time of the execution of the discharge, Julia and Maria were both minors, under the age of twenty-one years—hence the discharge is void.

Whether females are of full age at eighteen, or not until twenty-one, has never been decided in this State under the laws, as they existed, at the time of the execution of the discharge.

The constitution and statutes of this State leave the question unsettled.

At common law, females, as well as males, are not of full age until twenty-one. Bacon's Abr. 118. Infancy, A. Reeve's Dom. Rel. 227.

IX. We also insist, that we are entitled to interest from one year after the testator's death. This court so decreed in this case in 1818. *Smell v. Dee*, 2 Salk. 415. *East v. Thornberry*, 3 P. Wms. 126. *Bourke v. Ricketts*, 1 Ves. 333. *Sitwell v. Barnes*, 6 Ves. 520. *Earl Orford v. Churchill*, 3 V. and B. 59. *Wood v. Penoyre*, 13 Ves. 333. *Churchill v. Speake*, 1 Vern. 251. *Gibson v. Bott*, 7 Ves. Jr. 97. *Pearson v. Pearson, et al.* 1 Sch. and Lef. 12. *Maxwell v. Wettenhall*, 2 P. Wms. 26. *Taylor v. Johnson*, 2 P. Wms. 504.

And where a legatee is compelled to sue for a legacy, he is entitled to costs as well as interest. *Glen and Wife v. Fisher*,

Chittenden, 6 Johns. Rep. 36. *Caffrey v. Darby*, 6 Ves. 488. *Seers v. Hind*, 1 Ves. 294. *Piety v. Stace*, 4 Id. 620.

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X. This is not a stale demand that can be looked upon unfavorably by the court. The bill was filed when the youngest legatee was only eighteen years old, and as the legatees must all join in the suit, no laches ought to be imputed to them, if they sue as soon as they can sustain an action in their own names.

G. P. Marsh for defendant.

I. This is supposed to be the first case, in which the courts of Vermont have been called upon to decide, how far, and under what circumstances, co-executors shall be liable for the misapplication of the effects of the testator, by each other.

Executors were formerly regarded with jealousy, scrupulously watched, and holden to rigid accountability, in the English Courts, both of law and equity.

The origin of this severity is to be found in the fact, that by the common law, executors had a beneficial interest in the personal estate of the testator, and it was not unreasonable that those, whose legal rights were large, should be confined strictly within those rights.

But executors are now, both in England and in the American States, in most respects, mere trustees for the next of kin. The rigor, with which they were treated has been gradually relaxed, and they are now regarded with the same favor, as persons in other fiduciary stations. The reasons which, in England, have led to a strict supervision of executors, have never existed in Vermont, and the substitution of new statute liabilities has here entirely done away many of their common law liabilities, and greatly diminished others.

The statute regulates every branch of their official duty, and expressly gives an action, not only on the bond, but upon every decree of the probate court. That court has power to make every decree necessary, in the progress of the settlement of estates, whether of payment of debts or legacies, or of distribution of the residue, and its decrees may be enforced by process of commitment from the court itself.

Inasmuch, then, as original jurisdiction is vested by statute in the probate court, for all necessary purposes, it would seem, that the statute intended to impose no liabilities upon executors, except such as arise from disobedience to, or non-compliance with the lawful decrees of that court. It is further material to

observe, that the defendants were executors of an estate *represented insolvent*, and, as such, had duties to perform, and liabilities to meet, which are wholly unknown to the common law. The executor of an estate, represented insolvent, though nominated by the testator, is a mere creature of the statute, and has no other duties than such as the statute points out. He is merely the collecting and disbursing agent of the probate court, deriving his power rather from the court than from the will, bound by all its decrees, originally accountable to that tribunal alone, and not responsible for its errors. The probate court is, with us, the general guardian of the rights of infants, creditors, and legatees, and combines most of the functions of both the chancellor and ordinary in England. Nor does it alter the case, that, in the present instance, the estate of the testator proved to be solvent in fact, for the courts of this State recognise no distinction between solvent estates, represented insolvent, and estates insolvent in fact. *Atherton v. Flagg & Parker*, 2 Chip. 61-66.

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But as it has been contended, that joint executors in Vermont are, by virtue of their bond, rendered liable for each others' acts and defaults, to a greater extent than they were at common law, it becomes necessary to refer to the bond given by these defendants, and the statute under which it was taken.

By the statute in force at the date of the bond, 1 Old Comp. Laws, p. 124. Sec. 16, it is enacted that the executor shall give bonds "to return upon oath a true and perfect inventory of the estate of the testator," and "to *render an account* of his or her *proceedings* thereon, in the same manner as *administrators* are by law obliged to do; *unless* such executor is *residuary legatee, in which case*, bond may be given to pay the *debts and legacies* of the testator;" but he is not required to give such security in *any other case*, or to give bond for *faithful administration*, under any circumstances.

By referring to Sec. 26, p. 129, 130, we find that the *administrator's* bond contains a condition, that he "shall make, or cause to be made a true and just account of his said administration;" and *distinct* conditions of *faithful administration*, and *payment of the residue* in his hands to such persons as the probate court shall appoint.

By the common law, executors were not required to give bonds, the confidence reposed in them by the testator being in the place of a bond, whereas security was always required

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of administrators ; and it is most obvious, that it was the intention of the statute merely to require security for the *additional duties* imposed by the statute itself, and not to add any thing to the common law *liability* of the executor. The object of requiring an inventory, and the rendering of an account, was to oblige the executor to furnish record evidence of the amount in his hands for distribution, in order that the creditors, heirs and legatees might know the sum to which they were entitled, and at whose hands they should look for it.

The giving of a bond would serve not only as a security against the omission of these duties, but as an inducement to the executor to their speedy performance, and it is plain that the bond was intended to have no further force, from the fact, that the statute excludes security for *debts and legacies* in express terms, and for *faithful administration* by clear implication.

The bond, given by Harrington's executors, does not conform to the statute. Besides the two conditions specified by the act, it contains a condition that the executors "shall well and truly administer," &c.

If this clause has any peculiar force or meaning not embraced in the conditions required by the statute, it is void, because not authorized. *Lyon v. Ide*, 1 D. Chip. 46. *Hall v. Cushing et al.* 9 Pick. 398, 404. *Probate Court v. Matthews*, 6 Vt. Rep. 269, 275.

But it is conceived, that, even if valid, it is not broad enough to charge the defendants with the legacies.

Whatever may be the sense of the word "*administer*," in the English law, its meaning, under our system, must be restricted to the *collection of debts due the estate*, and *raising money to pay those due from it*. The *distribution* of the moneys and other effects is secured by a distinct condition in the bond given by *administrators*, and the word cannot mean more, when improperly introduced into an executor's bond, than when properly used in that of an administrator.

It will be observed, that the bond given in the present case omits the condition of payment, which, in the statutory form of an administrator's bond, immediately follows the clause providing for the rendering of the account, but the orators contend, that that clause has of itself the same force.

The only sound and sensible construction of this condition is the contemporaneous exposition of it given by the court in the

Judge of Probate v. Pratt, 1 D. Chip. 233, where the very question was decided. Chittenden,
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But admitting, for the sake of argument, the validity of the bond, we insist, that it does not vary the common law liability of executors for the acts and defaults of each other, but it merely increases the security against those acts and defaults, by increasing the number of persons responsible. Sparhawk
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The liabilities of executors arise, not from their bond, which is a mere security, but from the duties imposed by law, and the bond is to be construed, *reddendo singula singulis*. The surety and the delinquent executor are liable for the separate acts and defaults of each, and all the obligors for the joint act and default of all the executors. See *Kirby v. Turner*, Hopkins, 309, where this point is ably discussed and decided.

These arguments, we think, establish the position, that the executors of the will of a testator, whose estate is represented insolvent, are under no liabilities, except such as are imposed by statute, and inasmuch as neither the statute nor the bond render them sureties for each other, as to the payment of legacies, those, only, who have assets in their hands applicable to that purpose, are liable to the legatee, and *at least*, that, at all events, the responsibility of joint executors, under our statute, is, in no respect, *greater* than at common law.

II. But if the executors are to be treated as liable for the acts of each other in the same way, and to the same extent, as at common law, it becomes necessary to enquire what degree of mutual responsibility the common law imposes.

It is a principle well established, that if executors or other trustees have not been designedly guilty of a breach of trust, courts will favor them, and will endeavor to relieve them from any loss, which may happen from a misapplication of trust money. 2 Mad. Ch. 114. *Powel v. Evans*, 5 Ves. 839, 843.

1. If there are two or more co-executors or other trustees, one is not liable for the trust moneys, of which the other has possessed himself, even though there has been a misapplication, unless he concurs therein. *Fellows v. Mitchell and Owen*, 1 P. Wms. 81, 83 and *note*. 2 Mad. Ch. 129. *Hargshorpe v. Milforth*, Cro. Eliz. 318. *Balchen v. Scott*, 2 Ves. Jr. 678. *Shipbrooke v. Hinchinbrooke*, 11 Ves. 252. *Brazier v. Clark*, 5 Pick. 96, 104. *Brown's Executor v. Edgar*, 1 Dallas 311. *Raynor v. Pearsall*, 3 J. C. R. 579, 584, 586. *Thompson v.*

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Now the evidence in the present case shews that every thing has been done on the part of Buell, in the most perfect good faith, and he appears to have acted with reasonable discretion. There is no *lata culpa*, none of the *crassa negligentia*, which, as Lord North, 1 Vernon, 144. 1 Mad. Rep. 290, says is necessary to charge an executor.

Lyman was a co-executor, and, of course, in the confidence of the testator. He was the partner in business of the testator, nearly or quite to the time of the death of the latter, and was a creditor of the estate.

He was also an attorney by profession, and of fair character.

It was necessary to employ some one to collect the demands due the estate, and those circumstances pointed out Lyman as the fittest person for that purpose. *Thompson v. Brown*, 4 J. C. R. 619, 623, 628, 629. *Rowth v. Howell*, 3 Ves. 565.

2. Buell ought not to be liable for the misapplication of other funds by Lyman, because he could not draw them out of Lyman's hands. Lyman was a co-executor, and therefore had a clear legal right to retain the funds as against the other executors. He appears to have accounted not only for all the funds received from Buell; but for all others, except enough to satisfy the legacy to his children, and this he retained in the settlement of his account with the probate court.

III. There is a well founded and well settled distinction between the claims of mere *legatees*, and those of *creditors*. The latter being entitled to the utmost benefit of the law, executors have sometimes been holden liable to them on hard grounds, such as merely joining in a receipt, though one alone had the money.

The same principle has also, in some cases, been extended to heirs and distributees, whose claims are founded upon natural right, and the laws of the land. But the claim of a stranger legatee, to whom the testator owed no duty, is a mere equitable right, and no case can be found where an executor, innocent of concurring in the misapplication of funds, has been holden liable to a mere legatee. There seems to be no reason why a legatee, who has no responsibilities, should be thought to have greater

equity than an executor, who has so many, where the latter is not in fault. *Churchill v. Hobson*, 1 P. Wms. 242. S. C. Salk. 318. *Brown's Ex. v. Edgar*, 1 Dallas, 311.

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Having now considered the more general principles of equity governing the liability of executors, we shall proceed to examine the facts in issue, and the evidence, by which they are established.

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The bill is a common bill for a legacy, differing in the stating part, in one particular only, from the common form.

In addition to the usual charges, it alleges that after two of the female legatees arrived at the age of eighteen years, they were induced by the false and fraudulent representations of two of the executors, without any consideration, to give a writing acknowledging payment of their respective shares of the legacy, of the purport of which they were ignorant, until four or five years afterwards.

It is important to notice, that this last matter is repeated in the charging part of the bill, and that the defendants are particularly interrogated, whether the discharge was not obtained by fraud, whether the legatees, who executed it, were not ignorant of its contents, and whether any and what consideration was given or paid for it, as the answer of the defendant Buell is unquestionably thereby rendered responsive to the bill, and, of course, evidence conclusive for him, unless disproved by two witnesses. *Smith v. Brush*, 1 J. C. R. 459, 461, 462. *Stafford v. Bryan*, 1 Paige, 239, 242. *Woodcock v. Bennett*, 1 Cowen, 711, 743. *Smith v. Clark and Smith*, 4 Paige 368, 370, 373.

In like manner, that portion of the answer, which alleges that the executors *severally* and *not jointly* possessed themselves of the effects of the testator, is made evidence by the statements, charges, and interrogatories of the bill.

Moreover, the orators have chosen to put in issue the following facts only.

1. That the executors acted severally, and not jointly.
2. That Lyman possessed himself of assets, and retained the legacy against the consent of Buell.
3. That Lyman was poor at the time of testator's death.
4. The satisfaction of the legacy by the moneys expended in the support and maintenance of the legatees, and the wages of Charles.

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5. The allegations of the answer respecting the discharge by the two elder legatees.

The answer alleges,

1. The representation of insolvency of the estate of Buell, and the non-presentment of the orators' claim to the commissioners on his estate, and *insists* that the orators are barred by this neglect.

As to this point the answer is *not traversed*.

2. That Harrington's executors *severally* and not *jointly* possessed themselves of his estate. That his estate was represented insolvent and commissioners appointed, who, among other things, allowed Lyman \$2164,61, and that the estate was settled in due course of law, under the direction of the probate court, and all debts and legacies paid.

The only facts traversed under this head, are that the executors *severally and not jointly* possessed themselves of the testator's effects, and the payment of the legacy; the residue moreover appears from the probate record.

As to the matters traversed, the answer has already been shewn to be responsive to the bill, and, of course, evidence.

3. That Lyman had choses of testator in his hands at the time of testator's death, and afterwards *severally* possessed himself of other choses, to the value of four or five thousand dollars.

The statements, charges, and interrogatories of the bill make the answer evidence on this point also, so far as material.

The answer is unquestionably evidence, so far as it alleges Lyman's expenditures, as the consideration of the receipt given by the elder legatees, and if the other evidence adduced by the defendants be insufficient fully to establish the facts, as to all the legatees, it is a proper subject of inquiry by a master.

The answer, also, is evidence that the discharge was understandingly given, after the legatees arrived at full age, without fraud or concealment, and in consideration of moneys expended for them by Lyman, the statement of these facts being directly responsive to the bill, and utterly uncontradicted by any legal evidence.

It is objected, that the allegations of the answer are not to be received as proof, even where they would otherwise be evidence, because, as to some of them, the defendant swears "that he is *informed and believes*." This is the proper mode of alleging facts not within the absolute personal knowledge of the defen-

dant, however great may be his moral certainty of their truth, and, uncontradicted by legal evidence, is as conclusive as the most positive declarations.

To disprove the allegations of the answer, the only material evidence is that of the wife of the defendant Lyman, and mother of the legatees.

But her testimony is wholly inadmissible.

Though Lyman has not answered, F. Buell's answer is a defence for all the executors, and if he is discharged the orators cannot have a decree against Lyman and King.

The effect of her testimony, therefore, would be to charge her husband. *Clason v. Morris*, 10 J. R. 525, 542. *Cole v. Gray*, 2 Vernon, 79. *Vowles v. Young*, 13 Ves. 144. *LeTexier v. Margrave of Anspach*, 6 Ves. 323. *Alban v. Pritchett*, 6 T. R. 680. *Barron v. Grillard*, 3 V. and B. 165.

Nor will the husband's assent enable her to testify. 1 Phil. Evid. 66.

Authorities are not wanting to show that if orator calls on a defendant to testify, he waives relief against him, and of course against those chargeable for his default. *Harvey v. Tebbuts*, 1 J. & W. 197, 203. *Weymouth v. Boyer*, 1 Ves. Jr. 417, 419, 420, 426. 1 Hoffman's Ch. Pr. 465. *Thompson v. Harrison*, 1 Cox, 344.

If this doctrine be law, it is not easy to see why the attempt to charge him and his fellow-executors, through the testimony of his wife, should not be attended with the same results.

If Lyman wasted or misapplied the effects of the testator, it was not funds received of Buell.

IV. If Buell is to be considered as having assented to Lyman's retaining the legacy, or even as having paid it to him, it is a good payment in discharge of Buell.

1. Lyman had a right to control the estate of his minor children, as their natural guardian, until divested of this power by the court of chancery. Reeve's Dom. Rel. 290, 320, Swift's Dig. 49. 1 Black. Com. 452, 461. *Holloway v. Collins*, 1 Ca. Ch. 245. See also the late case of *Paine v. Low, Russel and Mylne* 223. 4 Cond. Eng. Ch. Rep. 397.

And although the right of the father to control the estate of his infant child has been denied in some of the States, yet the courts appear to have gone upon the ground of peculiar statutory provisions, and it is worthy of remark, that no case is to be

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found of the appointment of a stranger guardian, while the father is living.

2. The decree upon the petition in chancery did not divest him of this power, but ought rather to be regarded as a permission to expend the legacy for the benefit of his children.

It was a decree which the court had power to make. *Gregory v. Molesworth*, 3 Atk. 626, 627. Jeremy Eq. Juris. 217, 220. 1 Mad. Ch. 267. See also authorities cited below, on the subject of maintenance.

The notice and appearance were sufficient, *Thompson v. Jones*, 8 Ves. 141.

The prayer of the petition is, that the money might be paid to the parents for the *benefit* of the children, and the decree was that the parents should give security "*to pay to, or account with*" the children for the legacies. If the executors were all jointly liable, as the orators contend, there could be no "benefit" to the legatees by withdrawing the legacies, as the security would be thereby lessened, unless they were to be expended. The decree was in the alternative "*to pay to, OR account with.*" *Accounting* implies both debt and credit, and the petition and decree are both nugatory upon any other construction.

3. Nor was any liability imposed upon Buell, by the decree, as *trustee*. Lyman then had in his hands funds sufficient to satisfy the legacy, nor did he ever receive assets from Buell afterwards. Buell had no power to *compel* him to give the security required by the decree, though he endeavored to *induce* him to do so. Lyman, being co-executor, had equal rights over the funds of the estate, and none of his rights, as co-executor, were diminished or impaired by the decree. He in fact was the trustee under the decree, and Buell nominally so, only.

It will be observed, that the decree did not clothe Buell with any power to invest, control or dispose of the legacy. The payments were to be made by the executors generally, and not by Buell alone, and the only duty imposed upon him was to suffer his name to be used as obligee, and to decide upon the sufficiency of the security which should be offered. As to the funds in his own hands, they were disposed of, according to the directions of the probate court. The duty of paying the legacy was incumbent upon Lyman, as well as upon Buell. If Lyman could not lawfully receive it, there was no person to whom it could be paid, and it must remain in the hands of some one of the executors until the legatees should attain their majority.

Apart from the decree, other considerations pointed out Lyman as the fittest among the executors to have the custody of the fund, and the passing of the legacy to his separate account, allowed by the probate court as a compliance with the decree, is of itself a good payment in discharge of the other executors.

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The only breach of duty, then, under the decree, is the not furnishing of the security. But this breach was committed by Lyman alone, and for this he alone is responsible. The money retained by Lyman constituted the proper trust fund, and for the loss or misapplication of this fund, Buell, the supposed trustee, is not liable, for the simple reason that he never became possessed of it. But whatever liabilities Buell may have incurred, as trustee, it is clear he cannot be charged upon this bill, which seeks to charge him as executor only.

4. But it has been said, that the decree has no application to the case. That as Lyman gave no security, and there is no evidence to show that Buell paid him any money under the decree, it is to be treated as never having been complied with, and that therefore neither rights nor liabilities accrued under it.

If this be so, we still contend that the decree of the probate court, allowing the executors generally the amount of the legacy, by transferring it to the separate account of Lyman, in discharge of Buell, Harrington and King, is conclusive upon the legatees.

The probate court is a court of record, and its proceedings, unappealed from, are conclusive against all parties. The persons interested in the settlement of estates being usually numerous, the statute has dispensed with the service of personal notice to attend the settlement of the administration account, and has substituted a notice by publication. Thus cited, all parties interested have opportunity to appear, and are bound to take notice, and the proceedings of the probate court, which are in the nature of proceedings *in rem*, bind all the world. *Judge of probate v. Fillmore*, 1 D. Chip. 420, 423. *Wilson v. Keeler*, 2 D. Chip. 16, 20. *Harvard College v. Amory* 9 Pick. Rep. 446, 463, 464. 1 Starkie, Ev. 228. *Jenison v. Hapgood*, 7 Pick. 1, 7. Toller on Executors, 495.

Moreover the settlement has been long acquiesced in, and is therefore the more conclusive. *Hercey v. Dinwoody*, 2 Ves. Jr. 87, 93. *Higgins v Crawford*, Ibid, 571.

There can be no question as to the power of the probate court to prescribe the disposition of the funds, until the time of

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distribution shall arrive. The Probate court had power to order the executors to pay over to the residuary legatees all the funds of the estate, except the legacy. But the executors could not pay the legacy into the probate court, and as they had no common place of deposit, it must of necessity remain in the hands of some one of them. If the probate court does not possess the power of directing which executor shall retain the money until the time of distribution, the absurd consequence would follow, that *each one* would have the right to retain against his fellow executors, and against the distributees, a sum sufficient to pay all legacies not yet payable.

V. Lyman is equitably entitled to be allowed for the maintenance and education of his children, even if the decree of the Supreme Court did not authorise the expenditure of the legacy.

Upon a petition expressly for that purpose, permission would have been granted to expend the legacy, and an allowance ordered as well for time *past*, as for the time to come. *Heysham v. Heysham*, 1 Cox. 179. *Collis v. Blackburn*, 9 Ves. 470. *Ex parte Green*, 1 J. & W. 253-254. *Ex parte Swift*, 4 Cond. E. C. R. 562. *Ex parte Chambers*, Ibid. 563. *Reeves v. Brymer*, 6 Ves. 425. *Sherwood v. Smith*, Ibid. 454. *Ex parte Lord Petre*, 7 Ves. 403. *Ainsworth v. Pratchet*, 13 Ves. 454. *Maberly v. Turton*, 14 Ves. 499-500. 1 Mad. Chan. 272-273. *Davies v. Howard*, 4 Mass. 97. *Matter of Bostwick*, 4 J. C. R. 100. *Wilkes v. Rogers*, 6 J. R. 566. -577-594. *Brown v. Temperly*, 3 Cond. E. C. R. 390. *Rainsford v. Freeman*, 1 Cox. 417.

If the Court would have allowed the legacy to be expended for the children, they will sanction the expenditure now. 2 Mad. Ch. 128. *Lee v. Brown*, 4 Ves. 369. *Howe v. Dartmouth*, 7 Ves. 137-150.

If Lyman is entitled to such allowance, the other executors may have the benefit of it, though he does not claim it.

VI. The statute of limitations is a good bar.

1. It is now settled that courts of equity will adopt the statute, in all cases where the party has a remedy at law. *Angell on Limitations*, 339. *Kane v. Bloodgood*, 7 J. C. R. 90-126. *Sturt v. Mellish*, 2 Atk. 610. *Souser v. De Meyer*, 2 Paige, 574. *Stafford v. Bryan*, 1 Paige, 239. *Wych v. E. I. Comp.* 3 P. Wms. 309. *Bertine v. Varian*, 1 Edwards, 343-344. *Atwater v. Fowler*, Ibid. 417-420. *Hovenden v. Annesley*,

2 Sch. & Lef. 607, 631. *Codman v. Rogers*, 10 Pick. 112, 119. Chittenden,
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2. The legatees might have sued at law. *Morrill v. Morrill*, Sparhawk &
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2 N. H. Rep. 282. *Goodwin v. Chaffee*, 4 Conn. 163, 165, 166. 1 Swift's Digest, 455, 575. *Knapp v. Hanford*, 6 Conn. 170. 1 Old Comp. Laws, 152. § 81. *Van Hook v. Whitlock*, 3 Paige, 410-416.

Again, if the settlement in the probate court is not evidence of a payment to discharge Buell, Harrington and King, it is evidence of a liability to pay, upon which an action would have lain.

3. The bequest was a joint one, and, in case of the death of one of the legatees, would have survived to the others. Preston on legacies, 237, 238. *Martin v. Smith*, 5 Binney, 16. *Crooke v. De Vandes*, 9 Ves. 197. *Morley v. Bird*, 3 Ves. 628. *Webster v. Webster*, 2 P. W. 347. And where a claim is joint, if one is barred, all are so. *Perry v. Jackson*, 4 T. R. 516. *Marsteller v. McLean*, 2 Pet. C. R. 453. Starkie on Evid. prt. II. 901.

This defence may be insisted on by answer as well as by plea. *Bertine v. Varian*, 1 Edw. 343. *Norton v. Turville*, 2 P. W. 145. *Dey v. Dunham*, 2 J. C. R. 182. 191.

It is argued, that these legatees are entitled to a remedy on the bond, as well as by action of debt or assumpsit, and that because the presumption has not run upon the bond, they ought not to be barred in Chancery. But we, by no means, admit the soundness of the conclusion, though the premises be established. It is notorious, that bonds are required of executors in most, if not all the American States, yet the able courts in New York have often decided, that the statute is a good bar to a bill for a legacy, notwithstanding the bond.

But although the bond be valid as a security for the legacy, the force of this argument is entirely done away by the the provisions of our own statute § 12 p. 334, which, by compelling judgment for the penalty of the bond, deprive the party of the power of insisting on the presumptive limitation; and as it cannot be imagined that the legislature intended to render the liabilities upon probate bonds perpetual, it must be concluded, that they designed to allow him to avail himself of the general statute of limitations upon the assignment of breaches. If this position be well founded, the statute is as available a defence in an action upon the bond, as in any other suit.

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VII. The orators are barred by not presenting their claim to the commissioners on Buell's estate.

By our statute, p. 352, § 89, and p. 353, § 91, *all* claims and demands, not presented, are barred. This must, at least, embrace all claims of a nature to be enforced at law. We have already shown that the orators had a remedy at law, if at all, and the claim ought therefore to have been presented. *Gookin v. Sanborn*, 3 N. H. 491. *Brown v. Anderson*, 13 Mass. 201. *Paine v. Nichols*, 15 Mass. 264. *Burdick v. Green*, 8 Pick, 108. *Spaulding v. Betts*, 6 Conn. 28.

VIII. The receipt is a good discharge of the distributive shares of the two elder legatees.

The legatees were both more than eighteen years of age, at the time of its execution and therefore of full age. Const. Vermont, Art 1. Brayton, 124. And if not, their long acquiescence has established it, as the bill itself admits they knew its purport, within four or five years after its execution.

The receipt is *prima facie* good, and every presumption is in its favor. *Kirby v. Taylor*, 6 J. C. R. 242, 248, 249. *Kirby v. Turner*, Hopk. 309, 334.

Being *prima facie* good, the burden of proof is thrown upon the claimants to invalidate it. They adduce only the clearly inadmissible, and highly improbable testimony of Lyman's wife.

It has, however, been urged, that the answer itself shows that the receipt was without consideration, because it admits that no money was paid by the executors, *at the time* of its execution.

There is no principle better established, than that if orator reads any part of the answer, he makes the whole of the answer, relating to the same point, evidence. Moreover, we have already shown that the orators have, by the statements, charges, and interrogatories of their bill, put us to answer to the consideration, and have thereby concluded themselves.

The orators are obliged to read the answer, to prove that the money was not paid upon the giving of the receipt, and they thereby make the whole of the answer, relating to the consideration, evidence. *Smith v. Clark & Smith*, 4 Paige, 368, 373.

IX. But if the defendants are chargeable, interest should not be allowed. *Tyrrell v. Tyrrell*, 4 Ves. jr. 1.

C. Adams, for orators, in reply.

I. The claim was established by proof of the will, and, the sufficiency of assets being admitted, the orators were entitled to

their legacies, before payment to the heirs at law and residuary legatees.

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II. All, who undertook the trust, whether as executors or administrators, *cum testamento annexo*, were jointly bound to the execution of it. The authority derived from the probate Court, whether with or without a will, is joint, and the bond and undertaking are so.

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It is of no importance whether Lyman possessed a portion of the assets, or not. This claim rests on the same foundation as the claims of creditors, and, the estate being sufficient, the orators are entitled to payment, at all events.

Buell had ample funds of the estate, in his own hands, after paying all the creditors, to pay this claim, and actually paid a large amount to the residuary legatees. He should have first paid the specific legacies, and his neglect to do so is the ground of complaint. The orators were not the sureties of Lyman and are not to lose their claim, for his default.

The books make a distinction between the liabilities of trustees and executors for the acts of each other, making the latter liable in many cases, where the former would not be. In one sense all executors are trustees, but, in this case, they are trustees because they are executors. From the cases read on the other side, and the multitude that may be found in the books, the proposition may be deduced, that trustees are not liable for the separate acts of each other; but, when the money is under their joint control, and by any act, consent or agreement, one allows it to pass into the hands of his co-trustee, both are liable. *Murrell v. Cox & Pitt*, 2 Ver. 570. *Chambers v. Minchin*, 7 Ves. 198, 186, and the cases of *Sadler v. Hobbs*, *Scurfield v. Howes*, *Shipbrooke v. Hinchinbrooke*, *Brice v. Stokes*, *Crosse v. Smith*, *Joy v. Campbell*, *Doyle v. Blake*, and *Morrell v. Morrell*, as cited by Mr. Weston, in the opening argument in this case.

No case cited on the other side, excepting *Fellows v. Mitchell*, and *Westly v. Clarke*, are opposed to this proposition, and those cases have been frequently examined and disapproved. See case of *Murrell v. Cox & Pitt*, and other cases above cited.

But the examination of these authorities is scarcely necessary, as it is apparent that these executors acted jointly throughout. Their bond was joint, their accounts were joint, and their settlement was joint.

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III. The appropriate remedy for the orators is to be sought in Chancery. In most cases discovery, as well as relief, is sought, and, in many cases, a provision is required, which Chancery, only, has the power to enforce, as in the cases of married women and infant children.

In some States, as in New York, Massachusetts, and, probably, in Connecticut, actions at law, for legacies, are authorised. N. Y. Stat. 2 Vol. 90, 91 and 114. 4 Mass. Rep. 635. The case of *Goodwin v. Chaffee*, 4 Conn. Rep. 163, has the merit of singularity. The Court declare that assumpsit will lie for a legacy, but rule the case for the defendant, on the ground that a legacy is not a *debt*, nor a charge upon the estate, so that the probate court could order a sale of real estate. In 6 Conn. Rep. 174, the Court assume the ground that their probate court has peculiar powers. It is founded on two old cases, from 1 Root, 419, and 2 do. 271, both of which were against persons taking an estate liable to a legacy, and not against executors.

An action at law, in this State, if sustainable, would not afford an adequate remedy. What could be done with a legacy of a picture? or what, in cases providing for the maintenance of a wife or children, when specific execution, only, would be effectual.

But the authorities clearly show that an action at law cannot be maintained. *Deeks v. Strutt*, 5 T. R. 690, *Farwell v. Jacobs*, 4 Mass. Rep. 635. Toller on executors, 479. Foub. Fq. 565.

IV. The receipt, signed by Julia and Maria, is not binding, on account of their minority at the time of its execution; they being under the age of twenty-one years. 1 Bl. Com. 463. 2 Kent's Com. 233. It is also avoidable on the ground of want of consideration.

V. The father, if of sufficient ability, is bound to maintain and educate his children. 1 Bl. Com. 452, 461. 1 Swift's Dig. 49. *Farwell v. Jacobs*, 4 Mass. Rep. 635.

The Courts, in early times, seldom relaxed the rule, and only when children had large expectations. *Hughes v. Hughes*, 1 Brown, 387. *Andrews v. Partington*, 1 Brown, 60. *Davies v. Austen*, id. 178. *Lee v. Brown*, 4 Ves. 362.

In England, where children were entitled to large fortunes, an allowance has been made for their education. But this is in the spirit of their government, which studiously favors

aristocracy. *Maberly v. Turton*, 14 Ves. 499. *Lord Petre*, Chittenden, January, 1837.
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VI. It is fully settled that a father has no right to receive a legacy, due to his children, without having first been appointed their guardian and given bonds. *Dagley v. Tolferry*, 1 P. Wms. 285. *Miles v. Boyden*, 3 Pick. 213. *Cooper v. Thornton*, 3 Brown C.C. 96. *Genet v. Talmadge*, 1 Johns. C. R. 1. *Rotherham v. Fanshaw*, 3 Atk. 629.

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VII. The proceedings of this Court, which resulted in the decree of 1818, were based on the supposition that the legacies could not be paid to the father, without the aid of Chancery. Nothing was ever done under this decree, and, consequently, it affords no defence to this claim.

VIII. The proceedings in the probate court cannot affect the orators' claim, because they had no notice; because they were minors and without guardians, and, especially, because that court did not act upon any question, which concerned them. The question of payment is a matter to be tried elsewhere, and is wholly without the jurisdiction of the probate court.

IX. It is objected to the recovery of this claim, because it was not exhibited to the commissioners on Buell's estate. But there is an evident distinction between debts and legacies, in this respect. The former exists against the person, and may be enforced during the life of the testator. The latter are claims against the estate only, and can have no validity until after the testator's death. Debts rest in contract and are to be proved by evidence. Legacies are created by the will and are proved by it, and no intervention of commissioners is necessary to establish them.

Besides, this bill was brought before any representation of insolvency on Buell's estate.

X. This case does not fall within any of the rules of limitation. It is a common maxim that time does not bar a direct trust. There may be trusts by implication, where the statute may be a bar, as in the case of *Lockey v. Lockey*, Prec. in Ch. 518, but it has no application to those trusts, which are creatures of the Court of Chancery. As long as the trust continues, the *cestui que trust* is not barred. This is the case, also, at law, as between tenants in common, mortgagor and mortgagee, and in the purchase of a trust estate with knowledge of the trust. It is well settled in England, that the statute does not attach to

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legacies and distributive shares. *Sturt v. Mellish*, 2 Atk. 612. *Lawly v. Lawly*, 9 Mod. 32. *Cholmondeley v. Clinton*, 2 Mer. 360. *Decouche v. Savetier*, 3 Johns. C. R. 216. *Kane v. Bloodgood*, 7 do. 126.

In New York, it was ruled by Walworth, chancellor, that the statute might be pleaded to a bill for a legacy, the statute having given a concurrent remedy to a court of law, as he remarked, but he added, that if a legacy were chargeable on land, it could not be pleaded. *Souzer v. DeMeyer*, 2 Paige's Rep. 577.

But there is no statute which, in terms, applies, and none by analogy. The statute of eight years is insisted upon. But that cannot apply when no commission has issued. And as this claim was not exhibited, it is not changed into a judgment, by the report of the commissioners. The statute of six years does not apply, for no suit at law, for the legacy, can be sustained. An action might lie upon the bond, but in that case the defendants could only rely on the presumptive bar of twenty years. Besides, an action on the bond would be for a different and distinct claim, and in order to oust chancery of its jurisdiction, it must appear that an action would lie directly for the legacy.

REDFIELD, Chancellor—delivered the opinion of the Court.

The court have not been so fortunate as to come to an unanimous determination in the present case. They deem the case of much importance, both in regard to the principles involved, and the amount in controversy, and it is to be regretted any diversity of opinion should exist in relation to the judgment now given. A majority concur in the following results.

The testimony does not sufficiently show, that Phineas Lyman was in such circumstances of poverty, as to warrant him before the time of his failure in the year 1824, in appropriating the property of his children for their maintenance or education. Before the time he went into trade, in 1818, he seems to have been an attorney, doing a small business, at that time reputed to be worth about five thousand dollars, owning a comfortable dwelling and outbuildings and lot, worth fifteen hundred dollars, which he continued to own till the time of his failure. In short, till the time of his failure, he was in easy circumstances to support and educate his family in an independent manner. And although during all this time, he might *in fact*, have been bankrupt, still, this question must be determined by his *apparent* and not his *actual* means. We ought not now to allow the defend-

ants to claim to have expended this legacy in the support, maintenance and education of the legatees, unless, at the time the expenditures were in fact made, this court would, on application, have decreed, that such expenditures should be made out of the fund, from which it is now attempted to be drawn. This court would never have allowed the property of these orators, while infants, under the control of a parent of ample ostensible means for their support and education, to be expended for that purpose.

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It is the duty of parents to maintain and educate their infant children, "they being of sufficient ability." The benevolent object and true intent of such bequest, as the present, would be almost wholly defeated, if parents were permitted to expend the same without giving any security to account for it when the child should come of age. This court will order the guardian of infants, under suitable security given for the faithful discharge of the trust, to expend a reasonable amount of the property of the ward in his maintenance and education, if the ward is without parents, or they are wholly unable to maintain and educate their children in a manner suitable to their reasonable expectations, and the court no doubt would allow a deduction for *past* maintenance, under the same circumstances. This is not the present case. And it does not appear that Lyman, or his children, up to the time of his failure, ever supposed that he was expending this legacy in their support or education. The children were educated respectably, but just as they would have been, had this legacy never been made. Since the failure of Lyman, there is no pretence that any portion of this legacy has been expended by him in the education of these children.

There does not appear to be any evidence, that Lyman intended Charles' wages, which he was permitted to receive and appropriate, to go in lieu of his share of this legacy, and if such had been the expectation of the father, and even of the son, he would not be bound by it. What is said of the education of the other children is a sufficient answer to this claim.

It seems to be admitted by the answer, the proofs and arguments, that the defendant Buell, who is the only defendant that contests the claim of the orators, accepted the trust imposed by, and made probate of, the will, and took possession of property of the testator, to an amount more than sufficient to pay the debts due from the estate, and pay all the specific legacies, including the one now in controversy.

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It is an admitted principle that specific legacies are to be paid before any distribution is made to the residuary legatees, or to the heirs. A considerable amount of the funds, once in the hands of Buell, has actually gone to the residuary legatees. It is admitted and proved, that these legacies have never been paid to the legatees. It was as much the duty of Buell, as of any other of the executors, to see that this legacy was paid. He had the means of paying it, and had he in any way exonerated himself from this obligation?

It is true that the amount of this legacy has gone into the hands of Lyman for the purpose of meeting this object. But the evidence does not show, that Lyman took possession of these funds without the consent of Buell. The notes and other property, which he did obtain without the consent of Buell, would not exceed the amount of his own debt, which he had a right to retain. The other property, which went into his hands, must be considered as having been originally in the joint possession of Buell and Lyman, and, in contemplation of law, to have gone into Lyman's possession by permission of Buell. Under these circumstances, it would hardly be contended, that Buell could exonerate himself from liability, unless by showing what was equivalent to payment of this legacy. One executor is not indeed liable for the *devastavit* of another joint executor, in regard to goods which have never been under his control, but, if he permit funds, once in his hands, to go into the possession of his co-executor, and he squanders them, he is liable. And, this is upon the ground that each executor is liable for the faithful discharge of the joint duties, but not of the several duties. Hence, it is very apparent, that the mere fact, that the funds have gone into the hands of Lyman, for the purpose of paying this legacy, and which he promised to apply, but wasted, is no answer in the case of Buell, to the claim of the orators. Lyman was the last man, who should have been permitted to have the control of these funds, unless under regular appointment and proper security. The relation of parent and child is one of authority and unlimited influence on the one part, and obedience and dependence on the other. And the inequality of this relation is not limited, in any sense, to the term of minority. Hence, it is unsuitable that the property of the child, which the donor intended should be separate and independent of the parent, should be under his control, in any sense. Courts of probate, or chancery,

m appointing guardians to take charge of the property of infants, would not, in a prudent discretion, ordinarily select the parents for guardians, after the age of nurture is passed. This disposes of another argument urged by the defendants' counsel, that Lyman, as natural guardian, had a right to the control of the separate property of his minor children. This would make the legacy in the present case virtually vest in the father, which evidently was not intended by the testator, and whose intentions, no court would be thus warranted in perverting, unless for very sufficient reasons.

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Upon two grounds then, we think that Buell was originally bound to see to the payment of this legacy, whenever the legatees should come of age, or should have a guardian properly appointed. 1. That he had either the separate or joint control of all the funds belonging to the estate, except what Lyman had a right to retain on his own debt, and, 2d. even if Lyman had obtained funds sufficient to pay this legacy, without the consent of Buell, and which had never been under his control, still, as Buell had funds over and above these, more than sufficient to pay this legacy, and which have since gone to the residuary legatees, he should have appropriated them first to the payment of this specific legacy, and let the residuary legatees pursue the funds in the hands of Lyman.

If it be supposed that this involves the absurdity, that each executor may retain the amount of each distinct legacy, and that the residuary legatees might as well call upon Buell for the amount in his hands, as to call upon Lyman; it will be perceived that the apparent absurdity results from the obligation of a joint administration, which makes each executor liable for the acts of all the other executors. And had Buell wished to exonerate himself, he must have *compelled* the application of all the funds which he had *put* into Lyman's hands, as well as to *apply* those in his *own* hands.

It now remains to examine the several grounds, upon which the defendant Buell claims to be no longer liable to the demand of the orators.

1. It is said this claim is barred by the statute limitation of all claims, not presented to the commissioners on estates represented insolvent, the commission on the estate of Buell being now closed. But when it is considered, that at common law the remedy for the recovery of a legacy is in Chancery, and

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that it is now held, whatever might have been the earlier doctrine, that no action at law can be sustained directly for the recovery of a legacy or distributive share in an estate, it could hardly be said that the orators had a full remedy at law. If not, they might elect to pursue their claim in Chancery, as they did, the bill being brought pending the commission, when clearly no bar had attached upon the legal remedy, if any existed. But in analogy to the decisions in England, and in those States where courts of Chancery exist, we are inclined to hold that the appropriate remedy of the orators is only in Chancery. Of course they could have had no remedy before the commissioners, and have lost none by not presenting the claim to them. The cases in Connecticut and New Hampshire Reports, where it is held that a legacy may be recovered at law, seem to have been, in some measure, principles adopted *ex necessitate*, to help out an imperfect system of Chancery. A claim, which is not presented at the time of the commission being closed, or which is not strictly a legal claim, is never barred. *Jones v. Cooper*, 2 Aik. 54. *Blackmer v. Blackmer*, 5 Vt. 355.

2. The defendants insist upon the statute of limitations of eight years, as a defence to the orators' claim. It is undoubtedly true, that a court of equity will not lend its aid to revive claims barred at law by the statute of limitations, or lapse of time. Hence, if the orators claim be of such a character, that it comes within the provisions of any of the statutes of limitations, and the term prescribed has run, the claim cannot be asserted in equity even. But statutes of limitation operate upon the remedy, and not strictly upon the debt. If a party have two remedies, which are distinct and independent, although for the same debt, as a promissory note or bond for his debt, and a mortgage security upon land, and either be barred by the statute of limitations, he may still pursue the other. *Reed, Admr. of Craig v. Shepley et al.* 6 Vt. 602. *Belknap v. Gleason*, 11 Conn. 160, and authorities there cited. But from what has been already said, it will appear that the court do not hold a legacy to be in the nature of a debt, owing by the executor and by him detained; and if it were, the limitation would be six years, and not eight years, as pleaded. It will be equally difficult to perceive upon what ground this claim can be treated as a matter of covenant, on the part of the executor, unless it be the bond given for faithful administration, which has been decided not to be within that clause

of the act of limitations. *Probate Court v. Candler*, 7 Vt. 111. It is not necessary to say what presumptive limitation the court might or might not be inclined to apply to a case, where the requisite time had elapsed since any of the claimants came of age. It was held in the case of *Mattocks v. Bellamy*, 8 Vt. 463, that no term less than twenty years, unless aided by extrinsic evidence, was sufficient to raise presumption of payment, in a case not coming within any of the statutes of limitation. That term, in the present case, had not elapsed. It is thus fully shown, that the defendant, Buell, cannot be exonerated, on any statutory or presumptive limitation.

3. The decree of this court in the year 1818, that this legacy, with others, should be paid to the parents of the legatees, being minors, is relied upon by defendants as being a sufficient defence to the present bill. That decree provided for the payment to the parents, under certain restrictions, the most essential of which was, that the parents should give security for the faithful and full discharge of their duty, as guardians, by mortgage of real estate, and Ozias Buell was appointed trustee of the children, for the purpose of receiving that security. Some of the parents of infant legatees gave the required security and received the legacies. Lyman, having the funds in his own hands, neglected, and, indeed, declined to give the security. And in short, this case was not, in any sense, affected by the decree, unless the mere operation of the decree itself was to legalize that which before was illegal. We think, to give the decree of any court such an operation, would be an unheard of extension of the curing process of judicial proceedings. It is true, that what is done under the sentence, order, or decree of a court of competent jurisdiction, and in the execution thereof, is always legal, and can never be made the foundation of an action, until such sentence, order, or decree shall be reversed, and then only in the case of proceedings, not only erroneous, but irregular. It is admitted too, that this court have the appropriate jurisdiction of the person and estate of infants. The application in the present case was to the proper tribunal, and sufficiently formal.

But it is first to be considered, that this decree was only conditional. In its very terms, it was not to operate upon the property, until the parent had given security in a particular manner. Until that condition was complied with, the decree was as wholly

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inoperative as if it had never been made. That condition was, from its very nature, a condition precedent. Whenever an authority is conferred upon condition that security is given for the faithful performance of the trust conferred, the giving of such security is always a condition precedent to the vesting of the authority. Such is the present case. The fact, that the funds were already in the hands of Lyman, who was the person acting both as executor and guardian, cannot vary the case. If Buell was so situated as to have become liable for the application of the funds to the payment of a legacy, he must see to it that there is a legal application made, and this could only be done by payment to the legally constituted guardian of the legatees, they being infants. A payment to the infants directly, has been held void. *Davies v. Austin*, 1 Ves. Jr. 247. *Lee v. Brown*, 4 Ves. Jr. 362. And it is equally clear that payment to the father would be void. The cases cited by counsel show that, until recently, the English courts would not permit the estate of infants, in the shape of legacies from a stranger, to go for their education, maintenance or support, before the age of majority. But such is not the present doctrine of the English Chancery. And although a court of Chancery will permit the estate of the infant to be expended for present or future maintenance, or will, in proper cases, allow for past maintenance, this must be done in such a manner, as to secure the full benefit of such legacy or estate to the infant, and a mere payment to the father is not, of itself, sufficient. And it is difficult to perceive how this conditional order of this court varies the case. If the security had been given, very probably it would not have been necessary to pay the money again to Lyman, unless the terms of the obligation of surety had reference solely to property of the infant, by him received, subsequently to the date of the obligation. At all events, such security might have been given, as to reach the funds, then in the hands of Lyman. But until such security was given, those funds could not, in any manner, be considered as appropriated by the decree of this court, or by the general operation of law, to the payment of this legacy. The argument, that because this court had designated Lyman, as a suitable person to receive those funds, after having given proper security, he might therefore lawfully receive them, without any such security being given, or, indeed, that, *ipso facto*, funds, which he had squandered long before that time, actually

came back from their "lost estate," and, *eo instanti*, operated as payment of a legacy, which, until that moment, was "*due and unpaid*," and this by the force of a decree, in its terms, depending upon a condition precedent, which is confessedly not performed, involves an absurdity almost as gross, as that of permitting one man to appropriate the property of another, upon the ground of his having commenced an action, in which he *expects* to recover judgment and obtain execution, and thereby perfect his title to the property, which he thus unceremoniously proposes to put to his own use, in advance of his title.

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It is also contended, that the accounting before the probate court is so far an adjudication upon the subject matter of this claim, as to preclude a recovery here upon the part of the orators.

It is contended, indeed, on the part of the orators, that this decree of the probate court was not upon any such notice as the statute required. But it was held by this court, in the case of *Corliss v. Corliss*, 8 Vt. Rep. 373, that in regard to decrees of the probate court, it would be presumed that they were had upon proper notice and formal proceedings, although such previous proceedings did not appear of record. And in that case it was held that parol proof could not be received to show that no such notice and antecedent proceedings were had. This decree then is to be held as sufficiently formal.

It is undoubtedly true, that probate proceedings, and the adjudications of probate courts are *in rem* and bind all the world. But it is to be considered, that the judgment of no court is conclusive upon any matter, only collaterally in issue before it. The adjudication is only conclusive upon those matters *directly* passed upon by the court.

It is the constant practice, before those courts, when administrators or executors come to render their account, to credit them the amount of claims, returned by commissioners, as so much money paid by them. This is done without any inquiry whether those claims have been, in fact, paid or not. If assets are found in the administrator's hands, sufficient for this purpose, he is bound to pay all debts returned by the commissioners as due; and, being bound, it is not material to the question of accounting, whether the payment has been actually made or not. His bond is presumed to be sufficient security for that purpose. But no one ever inferred from this matter being passed to the credit of

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the administrator, in the general account, that, therefore, the creditors of the estate were concluded from pursuing the administrator for the recovery of their debts. The adjudication is for another purpose wholly. The object of the accounting is to ascertain the assets in the hands of the executor, and the distribution of those assets. The creditors have no interest beyond the amount of assets. If it be conceded that, at all events, such assets are sufficient to pay all the debts, then they have no motive to appear before the court. If the executor should be allowed by the court for paying debts or legacies, not due, and thus affect the *residuum*, this would undoubtedly conclude those interested in such *residuum*, and the executor would be exonerated, after paying the amount decreed to be paid to those entitled; for this is the object of the accounting, i. e. to find the amount of funds in the hands of the executor; and this matter is directly in issue, and, being adjudicated, the decree binds all interested in the question.

It is difficult to perceive why the case of a specific legacy should not come under the same rule with a debt due a creditor. If credited to the executor as so much "money paid," this, in contemplation of law, only *signifies*, that it is to be paid before the distribution of the *residuum*. For the purpose of ascertaining whether the debt or legacy is to be paid at all, the adjudication may be conclusive, but the executor must see to it that the money is paid, and he must keep his own vouchers for that fact, and cannot rely upon his decree of quietus, except for what it was intended, as pointing out the manner of disposing of the estate, and it concludes nothing, as to the fact, whether the estate has been thus disposed of. To extend the operation of probate decrees beyond this, and make them conclusive upon every collateral matter, recited, or in any way affected, by the proceedings, would be dangerous, and, indeed, subversive of all known and established principles upon the subject of adjudications, operating *in rem*, and not *in personam*.

As to the receipts relied upon by the defendants, as a discharge of the shares of the two eldest girls, it will be perceived, that they amount to an admission of payment, when the fact, as found, by this court, was otherwise. The girls, being more than eighteen years of age, could not by our law be treated as infants. At common law, males and females were upon equal footing, in this respect. But that section of the bill of rights in

the Constitution of this State, which declares involuntary servitude illegal, and not allowable after males arrive at the age of twenty-one, and females at the age of eighteen years, has always been considered as fixing the age of majority of females at eighteen years. And after so long a time of silent acquiescence, on the part of the people, and of virtual judicial construction by all the courts of the State, before whom it has ever become important to determine the question, we should not feel at liberty, now, to treat the question as open to discussion. Such construction of that section was contemporaneous with the adoption of the constitution, and expressive of the sense of its framers, and, as we think, for very sufficient reasons.

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We are not satisfied from the evidence that any fraud was intended, or was, indeed, practised upon those legatees. The testimony of Mrs. Lyman is laid out of the case, for the reason, that we think it did *tend* to charge her husband, by showing those receipts fraudulently obtained, and, if so, they could not avail the defendant Buell, and thus a decree might go against him. But if the receipt was permitted to operate as a defence for Buell, no decree can pass against the other defendants, although the bill has, as against them, been taken as confessed. For it has long been settled, that if one of two or more joint debtors, made defendants, suffer default, and the others go to trial and a verdict pass in their favor, judgment must be arrested as to the defendant defaulted. And if the testimony of the wife tend, only collaterally, to affect the interest of the husband, it cannot be used.

These receipts, then, not being under seal, cannot operate as a technical release, by way of estoppel. They only operate as an admission in writing, which is not different from an admission made without writing. It is testimony tending to show payment. It is like a promissory note, *prima facie*, upon good consideration, but not like a bond or other sealed instrument, conclusive. It may be shown, that a promissory note, or any other written contract, purporting to be upon sufficient consideration, was, in fact, given without any consideration. This is true of the receipts. A receipt, even for a less sum, expressed to be in full of a debt, is usually *prima facie* evidence of payment of the debt. But this, like all other evidence, resting in parol, is liable to be contradicted. In this case, it being shown that the receipts were given without any consideration, they can have

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no effect. If, by being given, they had operated to put Buell off his guard, and thus placed him in a different situation from what he otherwise would have been in, the case might have merited a different consideration. But that is not pretended.

Having disposed of all the different grounds of defence relied upon by the defendants, it would hardly seem necessary to enter into any discussion of the obligation assumed by the joint bond, given by all the executors with surety, for the faithful performance of all duties, including, of course, the payment of the legacies. The statute in force, at the time this bond was executed, did not prescribe the form of the condition of executors' bonds. The form of the condition of Administrators' bonds was given. And executors are required to give bonds to "return a true and perfect inventory of the estate, and to render an account of his or her proceedings thereon, in the same manner administrators are, by law, obliged to do."

This latter clause, in grammatical construction, would more naturally seem to qualify the act of rendering "an account," than the giving of bonds. But it would be a very frivolous construction of this statute, to limit that claim to the rendering of the account, and to hold that the rendering of the account had reference only to the statement of the executors' proceedings, and, whether true or false, no matter. We think there is no doubt the legislature intended that an executor's bond should be co-extensive, in obligation, with that of an administrator. There would seem to be no good reason why they should not be held to give the same security, that is required of administrators; which, indeed, *is now* required in terms. At common law, the authority was considered as conferred by the appointment of the testator. It was treated as a personal, fiduciary trust, and the executor was not holden to give any further security for the performance of the duty, than was implied from his selection. But the sound basis of such a rule is not very obvious to common sense, and in practice, it is believed no such rule ever obtained in Vermont. The forms in use, under the statute in force, at the time this bond was given, show, if nothing more, what was then the practical construction of the statute. Those forms are all similar to the bond in this case, imposing the same liability in the case of executors and administrators. The idea of requiring a bond for the mere purpose of securing the return of a correct inventory, and the rendering of a formal statement of the account

of the executor, without requiring any security for faithful administration, would seem to be preposterous. And the provision, that, when the executors were residuary legatees, they might give bonds "to pay the debts and specific legacies only," would seem to favor this construction.

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We think, in short, from the terms of the statute, it was intended that executors should, as they did in this case, give bonds for faithful administration, which will include the payment of debts and legacies; and that this bond, not extending the obligation beyond that, is valid and may be enforced at law. *Hall, Judge, v. Cushing et al.* 9 Pick. 395.

Being a joint bond it will bind each executor for all the acts of his co-executor. *Brazier v. Clark*, 5 Pick. 96. 1 Swift's Digest, 449.

And as the sureties would only be ultimately liable, in case of the avoidance of all the principals, and the other executors being confessedly insolvent, or out of the State, the burden would eventually be made to fall upon the estate of Buell.

And, if Buell is ultimately liable for the amount of whatever decree shall pass in this case against Lyman, and Lyman is confessedly insolvent, and Buell is so far directly interested in the subject matter as to be properly joined in the bill, and the subject is properly cognizable in this court, we should not dismiss Buell and pass the decree against Lyman alone, when the amount was eventually to come from the estate of Buell. But, having jurisdiction of the case for the purpose of inquiry and partial relief, we should feel bound to retain it and pass the decree against Buell, even if it were for the *devastavit* of Lyman, on the ground that the obligation assumed, in giving a joint bond, extended even to the case of the *devastavit* of a co-executor. *Rathbone v. Warren*, 10 Johns. R. 587.

So that, in either view of the case, we think the orators are entitled to a decree for the amount of the legacy and interest, up to the time of the accounting before the probate court. The interest up to that time is allowed on the ground that the executors had credited the interest, as having received it.

Since that time, and up to the bringing of the bill or demand of the legacy, (and the bringing of the bill is the first demand shown,) the right to claim interest will depend upon the rule of law applicable to the case. After the bringing of the bill, the orators are of course entitled to interest, as for the detention of the money.

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Trustees of this character, who have the charge of funds of the *cestui que trust*, are liable for interest in two events. First, Where they have actually received interest; and, secondly, where they might have realized interest. In the case of a pecuniary legacy, due to a person of full age, it would, doubtless, be the duty of the executor, in a reasonable time—say one year—to pay over the money, after demand, and perhaps, even without demand, or he will be liable for interest.

It seems to be well settled, that in the case of adults, entitled to a pecuniary legacy, especially when the executor is compelled to pay the same out of his own funds, he is not chargeable with interest until after demand, or until he has an opportunity to pay the same, when the legacy is not payable at a specified time. In the case of infants the rule is otherwise, and the executor has generally been held liable for interest. But when it is recollected that the defendant, in this case, (Buell) is compelled to pay the legacy out of his own funds, for permitting Lyman, indeed, to waste the funds of the testator, and for paying over funds to the residuary legatees, which should have been first appropriated to the payment of the specific legacies, under a mistake of the law, possibly; and when it is recollected that since the legatees, most of them, came of age, the claim has been permitted to lie by, for almost ten years, we do not think the claim for interest rests upon any very substantial grounds. It has been held that a legacy, payable to an infant, on his coming of age, is not to draw interest, notwithstanding the executor has had funds for the payment of the legacy. *Tyrrel v. Tyrrel*, 4 Vesey, Jr. 1.

We hold in this case, that the executor could not legally pay the legacies, until the legatees came of full age, or guardians were legally appointed, and to still hold the executor, Buell, who is compelled to pay the legacy out of his own funds, liable for interest, while he could not be permitted to pay the money, or while the legatees were lying by, after they came of full age, and when there is no pretence of his having received interest, is inconsistent with the just and reasonable duty of executors. We think the doctrine of the case cited from 3 Mumford, 198, *Cavendish v. Heming*, more in accordance with just principles. It was there held that, even in the case of infant legatees, the executor was not to be charged with interest until after guardians were appointed, and had notice of such appointment.

To hold the contrary doctrine would be to compel him to assume the burden and risk of having guardians appointed, or leave the money at his own risk, and thus assume the responsibility of a faithful guardianship of all the infant legatees, which must greatly enhance the extent of faithful administration, and in a manner, which would hardly be considered as coming within the obligation of the bond. The orators, then, are entitled to the amount credited to the executors in their account, and interest on that sum from the date of the bill. 1 Mumf. 150. *Fitzgerald v. Jones*.

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This disposes of the case, except the questions in relation to the operation of the petition for rehearing and the decease of one of the orators, there being no bill of revivor.

In the English chancery, and in New York, it is held that, on petitions for rehearing, the case is open for the party petitioning, only upon the points relied upon as a ground of rehearing, and rehearings there are usually upon some specific point upon the certificate of two counsellors, that there should be a rehearing, and then the entire case is open to the opposite party. But here, rehearings are only granted by order of two chancellors, and usually upon the merits and the entire merits of the case, and the whole case is considered as open to both parties. And so it will be perceived the present case has been treated.

In relation to the decease of one of the orators, it will depend upon the nature of the interest of the legatees. If the interest is joint, and in the nature of a joint tenancy, the *jus accrescendi* attaches, and the whole legacy may be recovered by the surviving orators, without the necessity of a bill of revivor. And such we think is the nature of this bequest. It was not a separate interest in each child in an aliquot portion of the gross sum, which was intended by the testator but a joint interest in the whole. The survivors are entitled to recover the whole. *Gilbert, Executor, v. Richards*, 7Vt. Rep. 202.

PHELPS, J. dissenting. The importance of this case, and the novelty of many questions involved in it, justify, in my judgment, the expression of my individual opinion. Whatever respect I may entertain for the judgment and opinion of my brethren, my own sense of duty will not permit me to acquiesce in a decision, which I am convinced is not sustained by sound legal principle, and which, in my opinion, does manifest injustice in the case in which it is pronounced.

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The outline of the case under consideration, I understand to be this :

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Wm. C. Harrington died many years since, having made and published his last will and testament, in which he bequeathed a special legacy to the plaintiffs, under the denomination of the children of Phineas Lyman, and similar legacies to the children of certain others of his relatives ; and constituted his two sons, Wm. and George, his residuary legatees. By the same will, he appointed the said Phineas Lyman and the defendant's intestate, Ozias Buell, with others, the executors of his will. The trust was assumed by the persons designated in the will. Lyman possessed himself of a portion of the assets, which were not only sufficient to pay the particular legacies, but left a considerable surplus for the residuary legatees. The debts of the testator having been paid, the executors remained, for some years, trustees for the legatees, who were minors, and having no legal guardians, the legacies could not be paid to them by the executors. In this state of things, the executors petitioned the court of Chancery to be relieved of their trust, and that court decreed payment of the particular legacies to the parents of the particular legatees, upon the parents giving bonds for the performance of their trust, in a manner prescribed by the court. This condition was complied with by all the parents, except Lyman, the father of the orators, and the several legacies paid to them by Buell from the assets in his hands. Lyman claimed the right of retaining the legacy to his children, out of the assets in his hands, and did so retain. A settlement was then had, in the probate court, of the executors' account, on which occasion the executors rendered and presented, in the first instance, separate accounts, but by direction of the probate court, they were afterwards consolidated. In these accounts Lyman claimed a credit for the amount of the legacy to his children, which was allowed, and Buell claimed a similar credit for the several particular legacies paid by him, in pursuance of the decree in Chancery, which was also allowed. The residuary legatees then preferred their claim for the surplus, which was duly paid to them by Buell, and their claim was satisfied. At this period, nothing remained in the hands of either executor, except the amount of the orators' legacy, which was in the hands of Lyman, he having retained the amount out of the assets in his hands. Up to this time Lyman was solvent, and in good credit. Buell, having accounted

for all the assets in his hands, was desirous of having the business so adjusted, as to secure him from all future claims, and *probably*, at his suggestion, two of the orators, on arriving at full age, executed to him their receipts for their portion of the legacy. It is not supposed that any thing was in fact paid to them on that occasion, but the object of those receipts was to sanction the appropriation already made of the fund in Lyman's hands, and relieve Buell from all further claims. Subsequently to all this, Lyman became insolvent, and Buell died. The estate of Buell was represented insolvent, and regular proceedings were had under a commission of insolvency, the time for the presentation of claims expired, and the commissioners made their report in due season. The claim of the orators was never presented nor allowed, but this bill is now preferred against the representative of Buell, to obtain payment of the claims, upon the alleged ground of the insolvency of Lyman, and a supposed devastavit or breach of trust in him. This is an outline of the case. I do not deem it necessary to go further into the details of the transaction here. Certain particulars, which may be important, as bearing upon certain points in the case, will be mentioned in their order.

The main question, and that upon which, in my judgment, the case turns, is, whether Buell can be made responsible for the default of Lyman. It is admitted that Buell has accounted for every farthing which came to his hands, and it is further admitted that Lyman has retained the amount of this legacy, for which he has never accounted; that all other claims upon the estate of Harrington have been satisfied, but, it is alleged that this legacy has never been paid, and that Lyman is utterly irresponsible. Upon these premises, there can be no possible ground of recovery against Buell, or his representative, unless it be a supposed liability resting upon him for the default of his co-executor.

It is obvious, then, that there is no peculiar equity in the orators' case. The claim against Buell is in the nature of a claim against a surety, and rests upon the footing of strict legal right.

It is conceded by the orators, and, if it were not, it requires no argument at this day to establish the position, that the trust of co-executors is not necessarily joint. At common law, their liability is several. Each is liable for his own acts alone. This is too manifestly the current of all authority to admit of debate.

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There are cases, in which an executor has been held liable for the default of his co-executor, but, in all these cases, the party charged has been accessory to the default, or chargeable with some delinquency in regard to his trust, which either induced or afforded opportunity for the default complained of. The mere fact, that one executor possesses himself of assets, and his co-executor did not prevent it, and possess himself of the same funds, is not enough; but the party to be charged must be guilty of some breach of trust, negligence, or disregard of duty, before he can be made liable.

It is insisted, "that if one executor possesses assets and passes them into the hands of a co-executor, who wastes them, both are liable." This doctrine requires some qualification. It is doubtless true, that if one executor possess assets applicable directly to the purposes of the trust, and passes them into the hands of a co-executor, without good reason or sufficient purpose, it is a breach of trust in not making the application himself, and he is liable. But cases may and do exist, where such a transfer of assest is necessary and proper, and where the proceeding is not only consistent with a conscientious discharge of duty, but in pursuance of the original design of the party creating the trust. I shall endeavor to shew presently, that this is such a case. So it is said, "that if one assents to a disposition of assets by the other, which proves a mis-application, both are liable." There is the best of all possible reasons for this, viz. that both are equally guilty. So, "if two join in a receipt for money, which comes to the hands of one who wastes it, both are liable." It is undoubtedly true, that when they choose to act together, in such a manner as to render the proceeding a joint act, it is the act of both, and both are responsible for it. But it remains to be ascertained, how, and in what manner, the transaction in question can be made a joint proceeding, and the default in question, the default of both.

Before proceeding to apply the general rule to the present case, it will be well to notice another position, viz. that the executors, having executed a joint bond, are of course liable for the acts of each other. To sustain this position, Swift's Dig. p. 449, is cited, and also *Brazier v. Clark*, 5 Pick. 96. Swift says merely that they may be made liable *in an action on the bond*, and the case in Pickering goes no further. So far as the joint undertaking by bond goes, they are unquestionably joint-

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ly responsible, and so would be a surety who executes the bond with them, although not a party to the trust. By executing a joint bond, they become sureties for each other; but it by no means follows, that in the character of trustees merely, and responsible as such in a court of Chancery, the nature of their obligation is changed. Had a remedy been sought on the bond and in another court, the question would have been different. But in this court, we have no concern with the bond, or the remedy upon it. The parties are before us as trustees; and the question is, what are their liabilities as such. Admitting that they are jointly liable on the bond, it by no means follows, that they are jointly responsible here. It is every day's practice in Chancery, to discriminate between persons jointly responsible at law. The remedy at law, on the bond, is no longer available. It is extinguished by the proceedings in relation to Buell's estate,—by the closing of the commission, and the peremptory bar of the statute. No mortal supposes that this court can revive that remedy, as against the surety, who may have signed the bond with these executors, nor can we revive it against any body. We may, indeed, enforce a trust, but the character of that trust is not to be varied by the existence of a collateral security, which once was, but is now no longer available.

My own opinion is, that we are to treat this claim precisely as if no bond had ever been given. But if I err in this, it is because the obligation of the bond and the duties of the trust are so blended and amalgamated, as to form an entire and indivisible duty, receiving its character from the impress of both. If this be so, and the claim of the orators is to be regarded as one and the same, whether entertained here or elsewhere, it will be difficult, I apprehend, to make out, that this identical claim is extinguished by the commission of insolvency upon Buell's estate, and, at the same time, still subsists with all its characteristics and incidents, to be enforced hereafter. Indeed it is impossible, in my opinion, to entertain this controversy, in this court, as arising out of the bond. It is only by disregarding the bond, and treating it as a case of trust merely, that this court can take cognizance of it. But of this more hereafter. I return to the question, whether Buell can be made liable upon common law principles.

There is no pretence, in my view, for treating the default as

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the joint act of these parties, or as growing out of their joint acts. To be sure they were co-executors and both acted as executors, but if this renders each responsible for the default of the other, what becomes of the rule, which is conceded by the counsel? The inventory may have been signed by both,—probably was; but this does not prove that both had actual custody of the assets. It is very common for one executor or administrator to take the sole charge of the assets, the other being associated for the purpose of advice, &c. It is also a common practice to divide the duties of administration, as was done in this case—Buell being the principal executor, and taking charge of the property in possession, and Lyman, being an attorney, taking charge of the books, and closing the professional business of the testator. A large amount of property came into the possession of Buell, in the disposition and management of which Lyman had no agency. On the other hand, a large amount of debts and demands came into the hands of Lyman for collection, in which collection Buell seems to have taken no part. No actual interference of his is shewn; nor indeed, that he was in any wise accessory to the proceedings of Lyman, except that he permitted the demands to go into his hands, or, as is insisted, placed them there. The effect of this will be presently considered. The case, therefore, presents an instance of several executors dividing their duties, each taking upon himself different branches of the administration or execution of the will. This is a very common case—a distribution of duties, evidently contemplated by the testator himself, and one, with reference to which the several executors were selected. If the rule, that co-executors are not responsible for the acts of each other, does not apply here, it is difficult to imagine a case, which would apply, and if, notwithstanding such a distribution, they are to be considered as acting jointly throughout, and in all particulars, simply because they make the arrangement in the outset, the rule itself becomes a matter of idle speculation, of no practical use or application. The cases cited are all at war with such a notion, and with the idea, that, although the executors act separately in fact, yet their proceedings are constructively joint. They shew abundantly, that, in order to make an executor liable for the default of his co-executor, he must be implicated in the particular default, either by concurring in it directly, or by some neglect of duty which led to it.

It is said, also, that the accounting in the probate court was joint and the settlement joint. This is not true in point of fact. It appears that the executors presented several accounts, which, by direction of the probate court, were consolidated. Nothing is clearer, than that this proceeding, which was purely arbitrary in the court, could not affect the question, whether these parties had previously acted separately or jointly. Had they presented a joint account in the outset, it would afford evidence, so far as it went, of an intent to assume a joint responsibility; but having acted separately, and presented separate accounts, the act of that court, in directing the form of that adjustment, could neither afford evidence as to their previous acts, nor conclude them as to their liabilities. But admitting, for argument sake, that the parties had acted jointly up to this period, yet another view of the subject may be taken equally satisfactory. There had then been no delinquency. Lyman was then solvent and in good credit, and fully as able, for aught which appears to us, to meet the claim, as Buell himself. He claimed a credit for the amount of the legacy due the plaintiffs as his children, by way of accounting for the funds in his hands; which credit was allowed. This, although no satisfaction of the legacy, was, at least, an appropriation of the fund in his hands for that purpose. Buell had then paid the other particular legacies, and proceeded immediately to pay the balance in his hands to the residuary legatees. He had thus accounted for every thing in his hands. Lyman had also accounted for every thing in his hands as executor, and all that remained to be done was, either to pay over the legacy in question, or give the security required by the court of chancery, as father of the legatees. In this state of things, the other particular legatees, the creditors, and residuary legatees, being satisfied, no person had any claim upon the fund in Lyman's hands except the plaintiffs. He held the fund, not as a fund for the general purposes of the original trust, but as a trustee for his children alone. Buell had in his hands no fund of any kind appertaining to the trust; and there had been, thus far, no breach of trust, with which either could be charged. At this period the trust was changed; Lyman became, instead of a trustee for the purposes of the will generally, a trustee for his children alone. He became in fact sole trustee; and if Buell were trustee at all, he was so nominally only. From this time forward, Lyman acted as sole trustee. Buell neither acted in

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fact, nor professed to act. Some years afterwards, Lyman became insolvent, and the plaintiffs, it is said, have never been paid their legacy. Now admitting that these parties acted jointly, up to the time of the settlement in the probate court, yet, subsequently, Lyman acted alone, and Buell is not responsible for his defaults.

I use this argument here, merely to show that Buell can not be made liable, upon the ground that he acted jointly with Lyman, at the time the breach of trust was committed. It will be seen, however, that this consideration of the severance of the joint trust, if it ever was joint, and the aspect which the trust then assumed, have a material bearing upon other points in the case.

I ought, perhaps, to add here, that, in this state of the business, Buell, having ceased to act, was precisely in the condition of a trustee, who had resigned his trust. Will it be insisted, that a trustee, who has retired, can be made responsible for the subsequent default of the acting trustee, upon the ground that they *act jointly*? I think not: but if he is to be made liable in such a case, it must be upon the ground, either that he is responsible, of course, for the acts of his co-trustee, or is in some way implicated in the breach of trust complained of. The first is not pretended, and the other part of the alternative I shall now consider.

If Buell be liable at all, as having been in any way accessory to the breach of trust, it must be either, because he suffered the fund to go into the hands of Lyman in the outset, or because he did not withdraw it afterwards. I make this the basis of my argument, because I see no other ground which can be taken. The question whether he should not have paid the particular legacy out of the funds in his hands, and turned the residuary legatees round to the fund in Lyman's hands, I consider not important to the main question of his liability; for if he can be made liable at all for the funds in Lyman's hands, he must be responsible to one or the other, and it is immaterial to which.

It is insisted that Buell is responsible on the first ground, because he placed the funds in Lyman's hands; and it is said that "if one executor possesses assets and passes them into the hands of a co-executor, who wastes them, both are liable."

I have already remarked upon this position, as requiring qualification. It does not hold where there is good reason for the

transfer. Thus, where an executor, residing in the country, had funds which he was desirous of paying over to a creditor in town, and remitted them to a co-executor in town for that purpose, who wasted them, it was held that he was not responsible. The reason of this is obvious. The fund must be remitted in some way, and to entrust it to a co-executor was as proper as to entrust it to a stranger. There was good reason for the remittance, and the executor was excused. But there is another qualification worthy of notice. The assets must be such, strictly speaking.

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With these qualifications, let us apply the rule to this case. A part of the property in Lyman's hands was obtained by him without the concurrence of Buell: a part, it is said, was placed in his hands by Buell. Admitting this to be true, although the evidence hardly sustains the assertion, yet that property consisted of demands in favor of the testator against sundry individuals, which were placed in his (Lyman's) hands for collection. These demands, although in one sense assets, were not such in another. They were assets when converted into cash, and not before. Now suppose Buell to have had these demands in his possession, and to have placed them in the hands of an attorney for collection, and the avails had been lost, without any default of his. Would he be responsible? Most clearly not. If then, he was at liberty to employ an attorney for this purpose, —and that he was, will not be denied—was he not at liberty to employ the man designated by his testator for that purpose? the man in whom the testator had reposed the same confidence as in himself?

For what purpose was Lyman named an executor, if he was to have no agency in executing the will? And how could Buell be required to exclude him from all participation in the trust, when the testator himself had appointed him co-executor with Buell, with equal and co-ordinate powers? It is to be borne in mind that the testator was himself an attorney, with an extensive practice and great property. He left, as we may well suppose, many things unsettled, and must have been aware that the agency of an attorney would be necessary in the adjustment of his affairs. It indeed was necessary. Lyman was also an attorney, a relative and partner in professional business with the testator. He was made by his relative and partner one of his executors, doubtless as a favor, and with a view to the benefit

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of professional employment in the business. Buell finding demands which it was necessary to collect, employs his co-executor for that purpose. How then it can be made out, that it is waste, culpable negligence, a devastavit, in Buell to commit this duty to the very man designated by the testator for that purpose, I confess is beyond my comprehension to conceive. Had Lyman been insolvent, or, in any sense, of doubtful responsibility, the case would have been different. But it is fully in evidence, that he was in good credit, and of apparent, if not real, responsibility, until long after Buell had closed his trust, and for years after the fund for the payment of this legacy was left in his hands, upon the final adjustment. Or, had Buell received the money upon these demands and paid that money to Lyman, instead of the legatees, I should hold him responsible upon the authority of the cases cited; unless, indeed, some justification had been shown. But I can see no analogy between such a case and the present; nor between this case and the cases cited, where a trustee seeks to avoid responsibility, by paying money to his co-trustee, instead of the person entitled to it. In this instance, it was not Buell's duty to deliver these demands to the legatees, but to cause them to be collected. He did so, and, in my opinion, selected the proper agent. On the other hand, the money arising out of these demands never came into his possession, but came, in the first instance, into the hands of Lyman. And so far as Buell contributed to this result, he did so in strict performance of his duty, and, as I believe, in pursuance of the intent of his testator. I see no reason, therefore, for charging him on this ground.

As to calling the money out of Lyman's hands, I know of no process, either at law, or in equity, by which Buell could effect it. Lyman, as trustee, was as much entitled to retain the money as Buell. Had Lyman been irresponsible, it would have furnished good grounds for the interference of the court of chancery. But the fact was otherwise, and there was as little reason to displace him as Buell.

The only course, which could be taken, was taken. A petition was brought by the trustees to be relieved of their trust. Upon this application a decree passed, directing payment of the legacies to the several parents of the infant legatees, upon their giving bonds to account with the legatees, upon their becoming of age.

This was the course adopted by Buell to close his trust, and the proper, if not the only course, which the case admitted of.

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Let us see then what was the effect of this decree ; whether Buell was guilty of any default in this part of the transaction, and whether the effect was to charge, or discharge him.

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It is to be borne in mind, that Lyman was one of the executors, and father of these legatees, that he had in his hands the amount of the legacy in question, which he professed to retain for these orators. In this state of things, Lyman and Buell brought their petition to be discharged of their trust as executors, and the court decreed payment of the several legacies to the parents of the several legatees, of whom Lyman was one, requiring security from the parents, by way of bond. In pursuance of this decree, Buell pays the other legacies, taking the security required, and pays the balance of assets in his hands to the residuary legatees. Lyman accounts for the amount in his hands, deducting the legacy, but did not give the security required.

The result of all this was, in my opinion, that Buell's trust was determined, and all liability on his part extinguished.

The object and intent of this decree was to put an end to the trust and responsibility of the executors, and this was its necessary legal consequence. The parents were substituted as trustees to the executors, and Lyman held the fund, not as executor, but as parent. Payment from Lyman to Lyman was not contemplated. To suppose such a ceremony to have been intended by the court is ridiculous, and a libel upon the court. But in this, as in all other like cases, the law made the transfer. It was like decreeing a dividend to a creditor of an insolvent estate, who is also administrator. The moment sufficient assets come to his hands, the law makes the application, and the debt is *ipso facto* paid. If this be doubted, let us examine the operation of this decree more in detail, both in regard to the fund itself, and those who held it. The argument, that these legatees could resort to Buell for their legacy, assumes that the other particular legatees could do the same. He was bound to pay them, upon their furnishing the security required, which he did. He paid them and their claim was satisfied. The residuary legatees were entitled to the *residuum* without giving security, and they received it. Thus Buell had paid over every farthing in his hands—his trust was fully executed, and, so far

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as he was concerned, the decree was fully complied with. Lyman still held the amount of this legacy, but that amount was no longer held for the general purposes of the original trust. The creditors, and the other legatees, were all satisfied—they had no claim to, nor interest in, the fund in question. The only persons interested in it, were these plaintiffs. Lyman held it in trust for them and them only. Moreover, the money was in the hands of the individual entitled to receive it, under the decree. The whole trust fund had gone to its proper destination. Lyman then held it in the same manner precisely, as the parents of the other legatees held their portions, and, in my estimation, a claim on the part of the other legatees for the default of their parents, in wasting the fund, would be as well founded against Buell, as this claim. How was it as respects Buell? Admitting that the trust was originally joint, yet Buell, so far as he was concerned, had fully executed his trust. He held not a cent in trust for any body. Lyman was, therefore, sole trustee from that time forward. There had been as yet no defalcation. Lyman was then fully responsible, and was so for years afterwards. How then can Buell be made responsible for his after default? This view of the subject furnishes a satisfactory answer to all the positions taken by the orators. Assuming that they were jointly responsible, as executors, by reason of their joint bond to the probate court, and that they acted jointly as executors, yet, when their duty, as executors, was discharged, there was an end of their joint responsibility. When a new and different trust arose, where Lyman was sole trustee, and these plaintiffs alone were *cestui que trust*, a trust not appertaining to their office of executor, but created by the decree in chancery, it is clear there could be no further accountability on the part of Buell for the performance of duties, not within the scope of his executorship, and appertaining to a trust, to which he was not a party. So, if Buell be responsible for the due application of the funds committed to his co-executor, yet that responsibility is satisfied when these funds reach their proper legal destination, are disposed of as the provisions of the will require, and are no longer a part of the original trust.

The only answer, which can be given to this argument, is, that Lyman did not furnish the security required by the decree. It is said that giving that security was a condition precedent to the payment of the money, and, therefore, the decree did not take

effect, nor will the law make the application, until that condition is performed.

So far, indeed, as respects the other legatees, whose parents were not executors, this is true. The decree contemplated a payment to them, which payment might be withheld until the condition was complied with. But as to Lyman, the case was different. The money was already in his hands, and it was so understood by the court. The language of the decree, so far as he was concerned, was, "keep the money as trustee for your children, but furnish us a bond for the faithful execution of that trust." From the nature of the case, the giving the bond could not be a condition precedent to the reception of the money, for the money was received before the bond was required. The true construction of that decree is, that it made Lyman a trustee for his children, and required of him a security in that character. The idea, that the security was a condition precedent in his case, is an absurdity. When, therefore, the original trust was broken up, and the fund distributed, the law made the application; leaving it to the court and those interested, to enforce the new trust against Lyman, either by exacting the security or otherwise. This necessarily resulted from the other proceedings under the decree. Buell having executed his trust, and the common fund being distributed, the money in Lyman's hands became, of course, the money of the orators, and he a trustee for them alone.

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Another view may be taken of this point, which, I apprehend, is decisive of the whole case. The sole ground of complaint in the case is, that Lyman did not give the security required. Had this been done, however worthless it might have proved in the end, it is not pretended that Buell would be liable. Indeed, had this been done, it is conceded that the decree in Chancery would have afforded Buell a full and perfect defence in this case. Every thing in relation to the execution of the will, and the final distribution of the estate, down to the execution of the decree in chancery, was performed agreeably to the requirements of the will, and the terms of that decree, except the omission on the part of Lyman to give the security.

Now how can Buell be made responsible for that omission. How could he compel Lyman to give the security? It is said he should not have paid over the money, until the security was given. This argument is nonsensical. The money was in Ly-

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man's hands, before the security was required. It was no part of his duty, as executor, to give the security. It was a duty imposed upon him by the decree, as trustee of his children. What had Buell, as executor, to do with this? He could not force the money out of Lyman's hands, nor compel him to give the security; and, admitting his liability in all respects, for the act of his co-executor, yet this was no part of that co-executor's duty.

The truth is, the requiring the security, as a condition precedent, was nugatory; as a subsequent duty, it was foreign to Lyman's obligation as executor, and, *a fortiori*, to that of Buell.

Besides, there was a full and adequate remedy against Lyman, which these orators might have enforced in this court, by compelling him either to furnish the security, or surrender the fund. They might have displaced him as trustee, and it was their own fault if they neglected this remedy until he became insolvent.

But it is said, that Buell should have provided for this legacy, notwithstanding the fund in Lyman's hands. Had Lyman been insolvent or in doubtful circumstances, before the payments by Buell, there would be some plausibility in this reasoning. But the fact was otherwise. It was then as much the duty of Lyman to guard against the insolvency of Buell, as the reverse. If they were jointly liable to the legatees, this argument is unimportant; but, if each was responsible for his own acts only, then the fact that Lyman had retained a fund for this purpose, was a sufficient reason for Buell's paying the other legatees.

It is argued however, that, although he was at liberty to pay the particular legacies, yet he was not justified in paying the residuum to the residuary legatees, as the former had a preference.

I do not perceive the force of this argument. Had the whole assets been paid to the residuary legatees, leaving nothing for the particular legatees, I admit he would have been liable. But the amount of assets had been ascertained, they were sufficient to pay the particular legacies, and a specific sum was left for the residuary legatees. The latter were as fully entitled to their specific portion as the former. I admit that if there be no more than sufficient to pay particular legacies, they must be preferred, but when there is a surplus, and the precise portion of each is ascertained, I can see no ground for a preference. Indeed, in this state of things, I do not understand what is meant by it.

There may be a preference where there is a deficiency of assets, but where there is no such deficiency, there can be none.

Indeed I see not how Buell could resist the claim, either of the particular or general legatees. Suppose the other particular legatees claim their legacies of him, would it be any defence against them that there was a fund in Lyman's hands, set apart for the payment of the legacy in question? It would be so, indeed, if, in case of a solvent estate, it would be a good reason for not paying one debt, that there were assets sufficient to pay others also. Nor can I see how he could resist the claim of the residuary legatees. The assets being liquidated, there could, as I have already observed, be no distinction between the claimants. If this needs further illustration, let us suppose there were assets to the amount of ten thousand dollars, or in other words, cash in the hands of the executors to that amount. There were, I think, four particular legacies of one thousand dollars each, and upon this supposition, there would be six thousand dollars for the residuary legatees. They are therefore entitled to the money in the ratio of six to four. Now by what logic can it be made out that one class is not entitled to their six thousand, as fully, absolutely, and without condition or preference, as the others are to their four thousand.

Lyman and Buell both could retain against the residuary legatees, only the single amount of this legacy. It is very clear, then, that, so long as the money was in Lyman's hands, set apart to pay this legacy, Buell could not resist the claim of the residuary legatees. Indeed there was an obvious propriety at that time, in Lyman's retaining in behalf of his own children.

There is nothing, then, in the proceedings of Buell, in paying over to the other legatees the assets in his hands, which should render him responsible to these orators; because he did simply what the necessity of the case required, and what a court of Chancery would have compelled him to do, had he refused.

I have thus far endeavored to shew, that Buell was never responsible for this defalcation of Lyman. A brief recapitulation of the argument may not be improper. In the outset, I assume, what indeed is not contested, that one executor is not, as a matter of law, liable for a devastavit of his co-executor. And it follows from this, as a necessary corollary, that one is not of course liable for all claims, whether by creditors or lega-

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tees, where there is a deficiency of assets through the delinquency of his co-executor.

I insist that Buell, in this case, is not liable for the default of Lyman, on the ground of their having executed a joint bond to the probate court.

First, because this would not vary the character of the trust, but they could be made jointly responsible only through the medium of the bond, or by suit upon it.

And secondly, because the original trust of the executors was executed and determined, before the supposed *devastavit* occurred, the only default consisting in Lyman's not giving the security required by the court of Chancery, as parent and guardian of the orators, without which this bill would not be sustained a moment; and this was evidently no part of his duty as executor, and not within the scope of the bond.

Further, Buell is not responsible upon the ground that they acted jointly, because he is not implicated in the particular default complained of, and it is not enough to render co-executors responsible for each other in all respects, that they have acted together in some respects; and, because, if they did act jointly as executors, yet there was no default in Lyman's retaining the amount of this legacy, as one or the other must be the depository of the funds, and it was as much the duty of Lyman to call the fund out of Buell's hands, as Buell's duty to call it out of Lyman's hands. And when Buell closed his trust, by paying over the funds in his hands to those legally entitled, there had been no default, no delinquency, and if Lyman afterwards squandered the fund held by him, as trustee for his children, it was an act not within the scope of their proceedings as executors, and Buell is not liable.

I also hold that Buell is not made responsible by reason of passing funds in his hands into the hands of Lyman, in such manner and under such circumstances as render him accessory to the *devastavit* by Lyman. First, because there is no satisfactory evidence in the case, that any thing passed from Buell to Lyman; and secondly, because, if any thing passed, it consisted of demands which were not assets until converted into cash, and which he might have placed in the hands of another attorney for collection, without making himself liable for a *devastavit*, and which, of course, he might lawfully deliver for that purpose to his co-executor, an attorney by profession, and one designated

by the testator himself. Although I admit, that one executor can not evade responsibility by a transfer of funds to his colleague, yet he makes himself liable only where the act is unnecessary, not called for, or improper. I maintain that it is not his duty to exclude his fellow from his trust, and that he is at liberty to permit him to act in collecting the assets, especially when there is satisfactory evidence that in so doing he pursues the intent of his testator. In short, my opinion is, that Buell can not be made liable on that ground, for the default of Lyman for this act, unless the act itself is culpable, or decidedly wrong. Had it been his duty to deliver these specific demands to the legatees, I should admit his liability; but as they would pay neither debts nor legacies until collected, it was his duty to see them collected, and I can not conceive how it should be deemed a violation of duty to select his colleague for that duty. In my apprehension, whatever may have been the responsibility of the executors, as such, yet Buell was fully and completely discharged of his trust by the decree of the court of chancery, and the proceedings under it, and the settlement in the probate court. By that decree the several legacies were directed to be paid to the parents of the legatees, they giving bonds, &c. This was done in all cases but this, and Buell had executed his trust by paying the last farthing in his hands, in strict accordance with the terms of that decree. Nothing remained of the testator's estate but the fund in Lyman's hands, set apart and appropriated to the payment of this legacy. Had Lyman given the security required, no mortal could have projected this bill. But he neglected it; and on this ground, and this alone, this suit rests. It is admitted on all hands, that, if the security had been given, the decree would have operated to discharge Buell effectually and forever.

Now I hold that the decree had precisely the same effect, so far as Buell was concerned; as if the security had been given. This fund was understood at the time to be in Lyman's hands, retained on account of this legacy. It was expected and designed that he should keep it. It was expected and designed that the other legacies should be paid out of the fund in Buell's hands. This was done. Now was there not a full and complete distribution of the assets? and was Lyman after this accountable to any human being, but his children? The old trust was extinguished and a new one created, necessarily, and as the

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Chittenden, inevitable consequence. The decree had taken effect fully and absolutely, except indeed, that Lyman had not given the security. But this was a thing to be enforced against him as trustee for his children, and with which Buell had no concern. The only answer to this is, that the decree was conditional; and it is said the trust was not shifted, because the condition precedent was not complied with. However this might be in the other cases, as to Lyman it could not be so. No payment by Buell to him was contemplated. The money was already in his hands, and was to remain there. The security was therefore not a condition precedent, but a condition subsequent,—a substantial requirement, to be enforced against him thereafter. As it was not a condition precedent, and could not be from the nature of the case, it could not prevent the trust's shifting. Buell had no means of enforcing this part of the decree, as he had in other cases. Whether we consider Lyman as holding as executor or as trustee for his children, seems immaterial, as Buell, if not responsible of course for the acts of his co-executor, can not be liable for Lyman's subsequent default, in retaining the money without giving security. Buell was under a necessity to pay the funds in his hands to the other legatees by force of the decree, and this furnishes an additional reason why it should protect him.

I now proceed to the question in the case growing out of provisions of the act, relating to the probate of wills and the settlement of estates.

Buell deceased long prior to the bringing of this bill, his estate was represented insolvent, regular proceedings were had under a commission of insolvency, the time for presentation of claims had expired, and the orators' claim was not presented.

In my opinion, it is barred. On this point, I assume, that whatever is strictly speaking a debt, *debitum in presenti*, must be duly presented, or it is barred. I also assume, that in all cases where Courts of Law and Courts of Chancery have concurrent jurisdiction, a bar of this description, if available at law, is also available in chancery; or, to speak more guardedly, when a Court of Chancery can do no more than decree payment of a sum of money which a Court of Law would adjudge, a bar of this kind is equally available in both courts.

It is to be borne in mind also, that this statute is of a different character from ordinary statutes of limitation *inter vivos*. The

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latter bars the *remedy*, the former the *claim*. The one may be varied, the other not. The latter is local, regulated by the *lex fori*, the former is peremptory and governed by the *lex loci*. We held in *Hunt v. Fay et al.* after repeated argument, that the limitation in the statute of New Hampshire to the presentation of claims against an intestate estate, the statute having taken effect in that State, where the creditor and intestate both resided, was a peremptory bar to the claim, when presented in this State to commissioners appointed under an auxiliary administration. This distinction is important, as it disposes of some cases, where one remedy has been enforced after another had been taken away. Those cases are where the statute of limitation has run *inter vivos*, but the provision of the probate act, as it bars the claim and not the remedy simply, bars of course all remedies.

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With these preliminary remarks, let us inquire whether the claim in question, if it ever had legal existence, is not barred by the statute above mentioned.

In the first place, if the bond gives a remedy, as it clearly does, for every default coming within the scope of the executors' duty, then the claim was susceptible of proof before commissioners. The default was committed long before Buell's decease, and Lyman was long before that period utterly insolvent. If therefore all claim within the provision of the bond, and all claim, which might be enforced by means of the bond, is barred absolutely, it is difficult to perceive what is left of the orators' claim. If it be admitted that this claim does not come within the scope of the bond, as not within the executors' duty, and not within the condition to discharge faithfully that duty, then there is an end of another ground, upon which the case rests. And if it be conceded, as it must be, in order to evade the effect of the statute in question, that the act complained of is not a breach of Lyman's bond, nor of his official duty, then it follows that it is a breach of duty in him *as trustee for his children*, and the case is disposed of upon the ground I have already taken.

It appears to me, that Buell's liability for the acts of Lyman is fully as extensive upon the bond, by which he undertakes specially for his acts, as it is when resting upon the mere relation of a co-executor. Indeed, it is more so. At common law, it is admitted, that executors are not liable for the acts of each other;

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but this bond is intended to cover all the acts of each in that character, and therefore, if they become obligated jointly, that obligation for each other is co-extensive with their duties. The orators, therefore, are in this dilemma; they must either bring their case within this statute, or place it beyond the pale of official duty, and attach it to a trust with which Buell had no connection.

It will not be pretended, I trust, that a court of chancery is not bound by this statute, or that it can decree damages for a breach of this bond, where a court of law would be precluded.

But put the bond out of the case, and it is, in my opinion, equally clear that this claim is barred by the statute.

Something has been said as to maintaining a suit at law for a legacy. Whether this can be done in this State, is not a question of much importance, as in our mode of settling estates, the question is not likely to arise. I see no great difficulty in maintaining such a suit in any case, where an action can be sustained against an executur, for the debt of his testator. If there be any objection to it, it is because a court of law would not go into an examination of the condition of the estate, to determine whether there are assets for the payment of legacies; but when the estate is represented insolvent, no such embarrassment can arise.

But be it a legacy, or be it what it may, there was certainly no difficulty, in this case, in presenting the claim, and having an adjudication upon it, before commissioners. It will be remembered, that before the decease of Buell, the estate of Harrington had been fully settled, all debts had been paid, and the surplus paid to the residuary legatees. A settlement had been had in the probate court, in which the executors had taken a credit in their final account, for this legacy, as paid, according to the usual practice of that court, which allows the executor for all ascertained charges upon the assets, whether in fact paid or not, leaving it to the claimant to enforce payment from the executor, and no further action of that court was to be expected in the premises.

Under these circumstances, this claim was no longer a legacy, depending upon the state of the assets, but it was a debt absolute and unqualified, ascertained of record, to which the claimants were absolutely entitled, and which the executors, or one of them, at least, were absolutely bound to pay; not merely as executors, but as individuals, having received the money for that

purpose, and having been already credited for the payment. It became, in this state of things, a private personal debt, no longer a claim upon the estate of the deceased, but a debt due from the living individual, to be paid from his own pocket; a thing with which an administrator, *de bonis non*, would have no concern. It was the same thing as if a third person had been entrusted with the orators' receipts for the amount, and had received it of the executor. An action of debt would unquestionably lie for it, or an action of assumpsit, unless the remedy by assumpsit was merged in a higher security. It may be compared to the case of a pension agent, who, having received the receipt of the pensioner, and had the same allowed to his credit, by his superior, objects to paying the money, because, as a public agent, he is not sueable for a pension. I assume, for the purpose of this argument, the original liability of Buell, although, in my opinion, he was not liable at the time of his decease.

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The fallacy, of the plaintiffs' argument consists in treating this as a legacy, when it was no longer such. As a legacy, it had been satisfied and paid, the money was no longer a part of the estate of Harrington, that estate, if I may use the expression, had paid it, and nothing remained but that Buell and Lyman, who had received the money from the estate, should pass it to the true owners. I can not conceive any difficulty in enforcing a claim under such circumstances, nor in its being allowed by commissioners. I do not understand how Buell's administrator could resist the claim, in this state of things, upon the ground that it originated in a legacy. No matter how the money came into the hands of the executors, It was there, and they are no longer accountable to the probate court, but to the orators alone. It was a proper claim for the consideration of commissioners, and, if not presented to them, is barred.

It has been suggested, that there is evidence tending to show a waiver, on the part of the administrator of Buell, of the protection of the statute. It is unnecessary to spend time upon this point, as it is well understood that the statute is not intended for the benefit of the administrator, but of the estate, and it is not competent for the administrator to dispense with it.

The only remaining ground, upon which it is attempted to evade this statute, is, that the case presents a trust cognizable only in equity, not within the powers of the commissioners, and, of course, not barred by the statute. This position assumes,

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what, indeed, is not to be denied, that there is a wide distinction between a mere trust, cognizable only in chancery, and a debt, which may be enforced at law. A mere statement of this distinction is sufficient to show on which side of the line this case falls. I have already endeavored to show that, although there was in this case, originally, a legacy given by the will of Harrington to these orators, yet, by the allowance of that legacy, by the probate court, and the credit given to the executors, in their final account, the nature of the claim was changed, and it became an absolute debt; and, as such, was proveable under the commission. The same reasoning will apply to it, viewed as a trust. If we denominate Buell a trustee for the legatees, still that trust was determined when the proceedings just mentioned took place in the probate court, and he became, therefore, a simple debtor for the amount.

In my apprehension, it is altogether fallacious, to treat this case as a case of trust, cognizable only in chancery. Buell, as executor of Harrington, was trustee for these orators in the same sense only, as all executors and administrators are trustees for creditors, heirs, or legatees. Call it a trust, or call it what you please, it is a subject falling within the exclusive jurisdiction of the probate court. The administrator or executor is the mere officer of that court, deriving his authority from that source, although the executor is nominated by will, exercising his functions under the superintendence, order, and ultimate jurisdiction of that court. In entertaining this subject, we invade that jurisdiction. The case before us illustrates this truth, with more force than any supposititious case. In the matter of Harrington's estate, that court established the will and allowed the legacy under it. Will it be pretended that this decree of that court, in a matter within its jurisdiction, is not conclusive? or that we have power either to set aside the will, or annul that legacy? Further, the Probate Court, upon the final accounting, not only ascertained that there were assets for the payment, but actually decreed the payment, and allowed the amount, as paid, in the executors' account. Whether it was, in fact, paid, or to be paid thereafter, that court would not inquire; no more than it inquires whether debts allowed by commissioners are, in fact, paid or not, when it credits the administrator for the amount. The reason of this is, that in all these cases, the claimant has adequate remedy in the ordinary common law courts. Now if

we have jurisdiction over the subject, we may disallow the legacy altogether, or decree that Buell shall not be holden to pay it. If we do this, we must necessarily overhaul the accounting; for if Buell is not compellable to pay the amount, he should not be allowed for the payment, but the balance in his hands must go to the residuary legatees. Here, then, we have overturned the whole proceeding in the probate court, and settled the estate of Harrington in a manner altogether at variance with the determination of the court, which, it is admitted, on all hands, has exclusive jurisdiction over the subject.

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But if we cannot do all this, nor, indeed, any of this, what is there left of our jurisdiction? Nothing indeed; for the case admits of nothing else, but to enforce the decree of the probate court, *because* it is the decree of that court. And here, a new and extensive field is opened for the exercise of chancery jurisdiction. The probate court decrees the payment of debts, as allowed by commissioners, and legacies, if any; or payment of an ascertained and liquidated balance, in the hands of an administrator, to the heirs; and all these parties come into this court, to enforce payment of a specified sum, adjudged to be due them, through the medium of a decree of this court, to be in its turn enforced by execution to be issued here, or by process of contempt. I am not aware that this court ever assumes jurisdiction, as a mere court for the collection of debts, or to aid in the enforcement of decrees of another tribunal, unless under peculiar circumstances, affording, of themselves, grounds for equitable interference.

If this subject requires further illustration, let us suppose that the probate court had rejected the will, and thus annulled the legacy. Would it be competent for us to establish either the one or the other? It will not be pretended.

If then this court can neither establish the legacy, where the probate court has disallowed it, nor disallow it where that court has allowed it, what becomes of the position that this is a case of trust cognizable only in Chancery? The truth is, the subject is not within the jurisdiction of this court at all, unless we interfere for the mere purpose of enforcing the decree of another tribunal.

But this is not all. The matter came before the probate court again upon the decease of Buell, in the settlement of his estate. That estate was represented insolvent, and regular

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proceedings were had under a commission of insolvency. This claim was not presented. Here, again, the subject fell within the jurisdiction of that court, and it was competent for that court to issue its commission of insolvency. This claim was liquidated and adjusted, and was proveable under the commission, beyond all controversy. But it is said it was a trust, and, therefore, was not proper for the consideration of commissioners. So is every case of administration or executorship a trust. But it does not follow, that, upon the decease of the executor or administrator, the subject of his official trust, or the allowance of claims against his estate is transferred to this court. If he have not so far executed his trust as to become personally liable, an administrator *de bonis non* is appointed by the probate court, where jurisdiction over the subject remains. If he have so far executed his trust as to become personally holden, then indeed, no administrator *de bonis non* can be appointed, but his obligation becomes a debt to be enforced in the mode prescribed by the statute. In this case, the account of the executors was finally adjusted. The whole estate of Harrington had been accounted for. The appointment of an administrator *de bonis non* would have been idle. It was a case with which such an administrator would have no concern. Upon the settlement of the executors' account, a sum of money was in their hands, directed to be paid to these orators. The original trust was adjusted and closed, and this debt was left to be enforced by the orators, and should have been proved under the commission. Nay, it is not pretended that Buell had a cent in his hands, but the case is put now upon the ground of his liability, for the default of his co-trustee, Lyman. If, then, he was liable on this ground only, by what perversion of names is it to be made out, that a liability of this kind, for the default of another, is to escape the operation of the statute, and the proceedings of the probate court, under the denomination of a trust.

There is still another view of the subject, worthy of consideration. I am unable to conceive what we have to do with the defendant, the administrator of Buell, as trustee. It is to be borne in mind, that this suit was not instituted, until after the decease of Buell, and was then brought against his son and administrator, Frederick Buell. He also is deceased, and the bill now stands against Marsh, administrator *de bonis non* of Ozias Buell.

Now it is clear that the original defendant in this suit was not,

by virtue of his administration, an executor of Harrington, because the statute is explicit on this point. He was not, therefore, a trustee upon the ground of succeeding to the original trust. In the next place, it is conceded that Ozias Buell had not a cent of Harrington's estate in his hands, at the time of his decease. F. Buell, therefore, did not receive any portion of the trust fund, and was not made trustee in that way. I admit that if trust property comes to the hands of an administrator, he may be treated as trustee, *quoad* that property, and it may be called out of his hands by the *cestui que trust*, because it is not a part of his intestate's estate. But here there is nothing of that kind. How, then, is F. Buell made a trustee? In no other way, clearly, than that he is administrator of O. Buell, (who was once trustee, if you please.) What is the condition of the trust? Simply this. The fund, intended for the payment of this legacy, got into the hands of the co-trustee, Lyman, under such circumstances, that Buell was responsible for it, and Lyman has squandered it. The claim is now made against Buell's administrator, upon that ground, and for a specific sum of money, which he owed the orators, having, at the time of his decease, no condition or trust attached to it, except that it was his duty to cause it to be paid to them long before his decease. Now if the administrator can be made a trustee as to this claim, he is a trustee as to any claim against O. Buell's estate; and we may, with equal propriety, entertain a claim in behalf of any other creditor of that estate. If F. Buell is to be made liable, (or Marsh, who succeeded him,) he is to be made so, as administrator, simply, and that liability is to be regulated by the proceedings of the probate court; and if one creditor may overleap the statute and the proceeding under the commission, another may do so. My objection is, that in sustaining this bill, we, in the first place, intrude upon the exclusive province of the probate court, and secondly, we nullify the statute, which requires all such claims to be presented to commissioners, and bars them, if not presented. I see no pretence for treating the administrator of Buell as trustee, except that he is administrator, a ground which exists in every case; and if we are to assume upon ourselves the settlement of intestate estates, and oust the jurisdiction of the probate court, I know not where we shall end. I confess I dislike the precedent. If we allow claims against an estate, which are barred by the statute, upon the ground of a trust in

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the administrator, the jurisdiction of the probate court seems to be useless. And if we attempt to exercise concurrent jurisdiction, that court proceeding with a commission of insolvency, and we by Bill in Chancery, the usual consequences of a clashing antagonist jurisdiction must follow.

The idea that Buell was once trustee will not sustain us. If there were a subsisting trust at the time of his decease, a new trustee should be appointed to supply his place. If he have squandered the trust property, or others have done it with his concurrence, or if a debt has grown out of a settlement of his account, as trustee, it is to be enforced, like every other debt, in the mode pointed out by law.

As to his administrator, I can conceive of no ground, upon which we can deal with him, unless he has received the trust fund, or some portion of it. If his intestate is indebted in any sum, for which the estate is holden, it is competent for the probate court to require a presentation to commissioners, and if this is not done, it is barred, peremptorily, by the statute.

To prevent misapprehension, I here repeat, that I use the words 'trust' and 'trustee,' in their strict sense. I am aware, that in the common parlance of the profession, these words are used in a general, and often loose, sense. But I here use them as denominating that sort of trust, which falls within the jurisdiction of a court of Chancery, exclusively, and not within the scope of ordinary legal remedy; and my object has been to prove, that this case does not present such an instance of trust, as is not susceptible of being brought before the commissioners of an estate, represented insolvent. And the position, which I take, is, that this claim was not only proper for the action of the commissioners, but that it should have been presented to them, and that, not having been presented, it is barred by the statute.

There is another point in the case, a subordinate one indeed, as it concerns two only of the orators, upon which I will say a few words.

It appears that two of these orators, after becoming of age, executed receipts to Buell for their portion of the legacy. It is not supposed that any thing was paid to them by him upon that occasion, but the receipts must have been intended to sanction the previous proceeding of Lyman, in retaining the amount in his hands, and to discharge Buell.

It is to be remembered that these persons were of full age,

when these papers were executed. They were not voidable on the score of infancy, therefore, but only for some imposition or mal-practice in obtaining them.

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To prove this, the testimony of Mrs. Lyman is put into the case; but, in my opinion, it falls far short of competent proof of the fact. In the first place, she is most clearly incompetent to testify, as her husband is party to the bill, and so identified with Buell and his liability, that he could not be made a witness. In the second place, her testimony is altogether too general. She says, merely, that the orators did not know what they signed, but gives no particulars, by which her means of knowledge can be tested. They might have been aware of the import of these papers, and still her testimony may have been very honestly given. But it is so highly improbable, that persons of full age would execute such an instrument, without knowing its import, that something very satisfactory is required to prove the contrary.

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Considering, then, that no fraudulent or improper practice was resorted to in obtaining the receipts, I have only to say, that the execution of them not only sanctioned the previous proceedings, but also placed Buell in a situation, in which he must necessarily yield to the claim of the residuary legatees. It affords also another ground for the reasoning already presented in this opinion, by which I have endeavored to shew, that, long before Lyman became insolvent, the original trust was at an end, and he became sole trustee for his children. Every other legacy had been paid, the estate fully distributed, except that the money in question remained in Lyman's hands, for the benefit of the orators, and two of them, being of full age, executed to Buell receipts for their portion. Now how it can be considered that Buell's original liability, as executor, continued, or that he was still joint trustee with Lyman, and answerable to these two, who had thus discharged him, is beyond my comprehension. This act, in my opinion, made Lyman, so far as the two children were concerned, a sole trustee.

Some other points have been discussed in the argument, which I deem it unnecessary to notice. I have remarked upon such only as were, in the view, which I have taken of the case, material; and I am admonished by the length to which these remarks have been extended, of the propriety of closing them.

In conclusion, I may add, that this is not an attempt to call out of

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Buell's hands money which he has ever received, or which was ever in his possession or control, as money. The nearest approach to it is, that sundry demands were once in his hands, which he passed over to Lyman for collection. But it is an attempt to recover from his estate money, which another has squandered, upon the ground of a supposed liability for the acts of that other. In addition to this, I cannot resist the suspicion, that much of this money had been expended for the benefit of the orators; for it seems they were well provided for in the wane of their father's fortunes. How much has been bestowed upon their maintenance and education, it is perhaps impossible to ascertain. But however this may be, the claim of the plaintiffs is not to be favored. It is one *stricti juris*, and, in that aspect, is not, in my opinion, sustained. I should dismiss their bill.

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In an action on the case for a deceit, it is not a sufficient answer to the statute of limitations, that the plaintiff was ignorant of his cause of action, until within six years, although that ignorance was occasioned by the nature of the deceit, or the manner in which the fraud was perpetrated.

Whether, in any case, a distinct subsequent fraud, perpetrated after the cause of action arose, by which the party is kept in ignorance of his right, would furnish a sufficient answer to a plea of the statute, *quærs*. If it would, still the practice complained of must be in itself a *fraud*, and the party must be deceived as to facts material to the action.

This was an action on the case, in which the plaintiff declared, that whereas at Richmond, on the 22d. Aug. 1822, a conversation was had and moved between plaintiff and defendant, of and concerning the purchase of the exclusive right of making, constructing, using, selling and conveying, Ballou's patent improved threshing and winnowing machine, in the counties of Chittenden, Franklin, and Grand Isle, which said right was, then and there owned by one Moses Dennett, of the county of Oxford and State of Maine, and the defendant, then and there, in said conversation, proposed to the plaintiff to be a joint purchaser

with the defendant, of the right aforesaid, for the counties aforesaid, of the said Moses Dennett, and the defendant, then and there, falsely, and fraudulently, represented to the plaintiff, that the right aforesaid could not be purchased of the said Dennett, for a less sum than \$900, although the defendant, then and there, well knew that the said right or privilege, for the counties aforesaid, might be purchased of the said Dennett for less than one half the sum aforesaid, to wit, for the sum of two hundred dollars, and the defendant, by said false and fraudulent representation, then and there induced the plaintiff to execute and deliver to the defendant his, the plaintiff's note, for the sum of four hundred and fifty dollars, two hundred dollars of which note was payable in boots and shoes, by the first day of July, then next, and two hundred and fifty dollars of said note, payable in good and saleable horses or wagons, or harnesses, in one year from the date of said note, and the plaintiff avers, that upon the execution and delivery of the said note to defendant, to wit, on the 26th of August, 1823, the defendant purchased of the said Moses Dennett the right aforesaid, and, then and there, falsely and fraudulently represented to the plaintiff, that he, the defendant, had delivered to the said Dennett the said note, for the payment of one half of the purchase price of the said right, for the said counties, and that the said Dennett had warranted the said patent to be a useful and valuable invention, and that payment upon the said note should not be demanded, in case the utility and value of said machine did not answer the recommendation of the said Dennett. And the plaintiff avers, that, afterwards, to wit, on the first day of November, 1823, he delivered to the defendant boots and shoes, to the value of \$450, the defendant, then and there, falsely and fraudulently pretending that the said note was then in the possession of the said Dennett, in the said State of Maine, and that when he, the defendant, should deliver the said boots and shoes, to the said Dennett, he would notify the plaintiff thereof, that the said property might be attached at the suit of the plaintiff and defendant, for the false representation of the said Dennett, relative to the expense in the building, and the utility of said machine. And the plaintiff avers, that in fact and in truth, the said note was always kept by the defendant in his own possession, he, the defendant, fraudulently concealing the same from the knowledge of the plaintiff, nor did the plaintiff know, until A. D. 1830, that a merely nominal

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price was paid for the said right, for the said counties, and that the said note of \$450, had always remained with the defendant, by reason of all which false and deceitful actings and sayings of the defendant, the plaintiff has been defrauded of his said boots and shoes.

There was, also, another count, declaring, substantially, for the same cause of action, and a count, in trover, for the boots and shoes.

The defendant pleaded, 1. the general issue :—

2. The Statute of limitations.

¶ The plaintiff replied, that the defendant, at the time he purchased the said patent right, in the declaration mentioned, of the said Moses Dennett, for a small and merely nominal sum, as aforesaid, collusively and fraudulently agreed with, and instructed the said Moses Dennett, not to disclose to the plaintiff, nor to any other person, the price, he, the defendant, had paid to the said Dennett for the same, but to keep the same a secret from the plaintiff, and that, in consequence of such collusive agreement with the said Dennett, and the fraudulent concealment of the defendant, the fraud, deceit, and falsehood of the defendant's representations to the the plaintiff, as set forth in plaintiff's declaration, were not discovered and made known to the plaintiff, until a long time after the payment in the plaintiff's declaration mentioned, to wit, in the spring of 1830, and that the said action was commenced within six years after the discovery of the fraud.

To this replication there was a general demurrer, and a joinder in demurrer.

Judgment of the County Court, that the replication was insufficient ;—and the case was brought here on exceptions to said judgment.

Wm. P. Briggs, for plaintiff.

I. The defendant seeks to shield himself, under the statute of limitations, from the consequences of that just retribution, which this court would otherwise administer for the gross fraud he has practiced upon the plaintiff.

II. It is believed to be a well settled principle in Chancery, where the bill alleges fraud in the defendant, and the defendant pleads the statute of limitations, to permit the bill to be so amended, as to allege the discovery to be within six years. *Wharton v. Lowry*, 2 Dal. 364. 1 D. Dig. 625, and the authorities there cited.

III. Can there be any difference between the law and equity side of this court, in this respect? There may be cases, too, says Lord Mansfield, which fraud will take out of the statute of limitations. *Bree v. Holbeck*, Doug. Rep. 656.

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IV. In Moseley's Reports, 18, 244, 245, it is held that fraud will prevent the operation of the statute of limitations. 5 Dane's Dig. 399.

The case of *First Mass. Turnpike Co. v. Field et al*, 3 Mass. Rep. 201, was decided after full hearing, and is in accordance with the principles of natural justice, and is supported by authority.

V. The demurrer admits the defendant had closed, by his own craftiness, all the avenues, by which the plaintiff could arrive at a knowledge of the fraud, and if the defendant is now to be protected, then is the law, instead of being a rule of moral action, enforcing what is right and prohibiting what is wrong, the mere pander to the corrupt designs and baser passions of our nature.

J. Maecck, for the defendant, contended, that the replication was insufficient, that the statute began to run the moment the plaintiff's cause of action was perfect, and that it was immaterial whether the plaintiff's ignorance of his rights were the result of the fraudulent concealment or fraudulent representation of defendant, or not. That the statute not only declared, that the action should be commenced within six years from the time it accrued, but expressly inhibited its being commenced or prosecuted after that period, and that, as the legislature had made divers exceptions from the operation of the act, in the act itself, the court could not add to the number of exceptions. In support of his position, he cited the following authorities. *Battley v. Faulkner*, 5 C. L. R. 288. *Short v. McCarthy*, id. 403. *Howell v. Young*, 11 do. 219. *Lord Oakley v. Kensington Canal Company*, 27 do. 64. *Clark v. Hougham*, 9 do. 47. *Troup v. Executors of Smith*, 20 John. 33. *Oothout v. Thompson*, 20 do. 277. *Leonard v. Pitney*, 5 Wend. 30. *Hamilton v. Shephard*, 2 Murphy, 115. *Thompson v. Blair*, 2 do. 583. *Callis v. Waddy*, 2 Munford 511. *Granger v. George*, 11 C. L. R. 185. *Brown v. Howard* 6 C. L. R. 25.

The opinion of the court, was delivered by

PHELPS, J. The question, arising upon the demurrer, in-

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volves the sufficiency of the plaintiff's replication ; and the case resolves itself into two inquiries, viz. whether a fraudulent concealment of the plaintiff's cause of action will protect him against the operation of the statute of limitations, and, if so, whether such a fraud is here alleged as will satisfy the rule.

It is a general rule, that the statute of limitations begins to run from the time when the cause of action accrues, or, in other words, from the time when the plaintiff's right of action is perfected. And it is well settled by numerous precedents, that mere ignorance, on the part of the plaintiff, of his cause of action, creates no exception to the rule. Indeed, if such an answer could be given to the plea of this statute, it is manifest that no distinction can be made, between cases of fraud and cases of any other description. On this point, however, there has never been but one opinion. No case can be found, in which the plaintiff's ignorance of his cause of action has been held, of itself, a sufficient answer to the statute.

If, then, there be any thing in the answer here set up, it must derive its force from the ingredient of fraud. It is insisted, in general terms, that fraud will take a case out of the statute.

Before the correctness of this doctrine can be tested, it becomes necessary to ascertain with accuracy what is intended by it. The proposition admits of various interpretations, and, with a view to its practical application, may be resolved into several subordinate questions.

Is a case, originating in deceit, within the statute at all?

If so, is the application of the statute to the case to be qualified so far, as that it will take effect only from the time when the deceit, or its consequences, may be discovered?

Is there any distinction, in this respect, between the original deceit, which constitutes the gist of the action, and a subsequent and distinct substantive fraud, having for its purpose the concealment of a cause of action, already perfect?

These, and other questions of a similar character, may be put, tending to test both the general accuracy of the doctrine, and its application, if it be in any case sound, to particular cases.

In the view, which we have taken of the subject, we confine ourselves to the question, as it arises in a court of law. The subject presents itself in a very different light, in a court of chancery, exercising its peculiar jurisdiction ; for, although that court is, in general, bound by the statute of limitations, yet, in

the exercise of its peculiar jurisdiction over frauds, and especially for purposes not cognizable at law, it will relieve from the operation of this statute, as it will against any other undue legal advantage. And I may here add, that the precedents, cited from some of our sister States, lose much of their weight, when it is considered, that, having no chancery court, they have found it necessary to blend some of the distinctive doctrines of chancery with their common law code.

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[In support of the general doctrine, that fraud will take a case out of the statute, the case of *Bree v. Holbech* is cited. All, which can be derived from that case, is, that Lord Mansfield was not then prepared, upon the spur of the occasion, to deny the doctrine totally, absolutely, and without qualification. The case did not require a decision upon that point, and the doctrine was not recognized.] He admits, "there may be cases, which fraud will take out of the statute;" but the case, instead of sustaining the doctrine, as one of universal, or even general application, proves the reverse.

✶ In the State of Massachusetts, it must be admitted, the doctrine, contended for by the plaintiff, has been adopted. How far the courts of that State, having no court of chancery, were influenced by the consideration already suggested, is not for us to determine. But the doctrine was subsequently examined by the Supreme Court of New York, and its soundness there distinctly denied. It must be admitted, we think, viewing the doctrine with reference to proceedings at law, that the weight of authority is most decidedly against it; especially, if we consider its adoption in some States, as a substitute for a distinct chancery jurisdiction.]

In principle, we think it can not be sustained, as a general rule of law, in the broad terms made use of; but if it be applicable to any case, it must be to one of peculiar character, and under circumstances deserving of special consideration.

It will not do to say that, whenever the cause of action originates in fraud, the statute of limitations does not apply. Such a decision would repeal the statute. The case is, in terms, embraced in the statute, and, by the express provision of the law, the statute begins to run from the time when the cause of action accrues. Whether the operation of the statute would be more equitable, if a different criterion were adopted, is a question for legislative consideration. We can neither repeal nor alter the

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statute—we can, therefore, neither exempt the case from the operation of the statute, nor control that operation, by suspending it till full knowledge is obtained, by the party, of the character and consequences of the injury. [Whether the ignorance of the party is fortuitous merely, or results from the character of the fraud, or the manner in which it is perpetrated, we consider immaterial. We are of opinion, that where the cause of action is perfected, and the statute of limitations has subsequently run, the action is barred, although the party may have been ignorant of his cause of action, and that ignorance may have resulted from the character of the original fraud, or the manner in which it may have been perpetrated.

We are, by no means, sure that this is not the most equitable doctrine. The statute of limitations, as applicable to a case like this, is emphatically a regulation of policy. Its object is to put a perpetual seal upon stale controversies, and prohibit their agitation, at a period, when the usual means of eliciting truth are not at hand, but are removed forever,—when right can not be ascertained, and justice must be administered at random. If we make the protection of the statute to depend upon the plaintiff's knowledge of his injury, we require the defendant to perpetuate the evidence of that knowledge, during all time; and we expose him, when this and other evidence, necessary for his defence, shall have passed from him, to fresh litigation, with no other guide to a correct adjudication, than the shreds of evidence, which accident, or a more subtle and sagacious adversary, may have preserved. If we could engraft such a provision upon the statute, we should destroy its practical utility and defeat its great purpose.]

Another and a more difficult question may arise. Whether, the cause of action being perfected, a subsequent, distinct and substantive fraud, having for its object to deceive the party in relation to his rights, would take the case out of the statute, is a question, which we do not deem it necessary to decide. Such a case might arise, where the action is founded on a contract. In such a case, whether the remedy on the contract would be barred, although the statute may have run, in consequence of a fraudulent concealment, would admit, perhaps, of different consideration.

We do not consider this case as of that description. Nothing is set forth in this replication, except what constitutes a part of

the original deceit. This being the case, the subject falls within the rule already laid down.

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Nor do we think that the matter, set forth in the replication, amounts to such a fraudulent concealment, as would affect the case, under any rule.

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In the first place, a mere request of secrecy to a third person, sustaining to the transaction the mere relation of a witness, has never, as we believe, been regarded as an actionable fraud. Nor can we so regard it here, inasmuch as no application appears to have been made to the witness, to disclose the facts of the transaction, nor does any mis-representation appear to have been made to the party, in relation to them.

In the second place, if we consider the representation, as to the cost of the contemplated purchase, as the gist of the action, the actual price paid is not important. The question is, whether the defendant's representations were *bona fide*, or otherwise? and the mere fact, that he gave a less price than was expected, does not constitute a fraud.

In short, it does not appear that there was any fraudulent concealment of the facts, known to the witness, nor, if there had been, does it appear that those facts were material to the action. Admitting that a fraudulent concealment would have the effect contended for by the plaintiff, still, that concealment must be of facts essential to the action.

Upon the whole, we see nothing in the case to take it out of the statute of limitations; and the judgment of the County Court must be affirmed.

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SAMUEL R. BROWN v. ROYAL P. STACY.

On issuing a writ of *audita querela*, no other recognizance for cost is required by the statute of 1822, than was required by the 11th section of the judiciary act.

The absence of a justice of the peace from the place, to which a cause has been adjourned by him, for the whole half day, within which the cause was set for trial, is a discontinuance of the action.

Quere. Whether his absence from such place, for two hours after the time, would operate as a discontinuance?

Audita Querela, to set aside a judgment of a justice of the peace. The recognizance was in the form prescribed by the 11th section of the judiciary act, Revised Stat. 61. The defendant pleaded in abatement, that there was no sufficient security to the defendant, by way of recognizance, for costs. Plea overruled by the County Court. The defendant then pleaded the general issue, and, under that plea, proved that the original suit, before the justice, was continued from the 24th day of April, 1835, to the 28th day of the same month, at nine o'clock, in the forenoon; on which day the parties both appeared between nine and ten o'clock, but that the justice did not appear till a few minutes before one o'clock, P. M. when both the parties were still present. That he then notified the parties that he would proceed to hear and determine the cause, but that the defendant declined to answer and left the place—and that, thereupon, the justice rendered judgment for the plaintiff. Upon this evidence the County Court instructed the jury to return, and they did return, a verdict for the complainant. Exceptions by defendant to the decision of the County Court on the plea in abatement, and to the instructions of that Court to the jury.

Hyde and Peck, for the defendant.—I. An *Audita Querela* is an original writ, within the general statutes, requiring security for costs. The recognizance in this case is not a compliance with the statute, as, in the event of the re-delivery of the body, it affords no security for costs. "Intervening damages" is not inclusive of costs, but is restricted, in its import, to damages, resulting from delay in the collection of the debt.

II. If this complaint can be sustained on the merits, it must be for some fraud in the plaintiff below, in obtaining judgment, whereby the defendant was deprived of his day in court, or upon the ground of an absolute want of jurisdiction in the court. But the delay was the fault of the justice, and not the fraud of

the plaintiff, and the office of an *audita querela* is to relieve against the misconduct of the party, but cannot reach the errors of the court. *Weeks v. Lawrence*, 1 Vt. Rep. 443. *Dodge v. Hubbell*, *ibid.* 491. It is a rule, adhered to, with the utmost strictness, never to afford relief, by this writ, where the complainant has had any opportunity of making his defence, either in the original action, or in any subsequent proceedings. 6 Dane's Dig. 317. 2 Saund. Rep. 148, b, note 1. *Barrett v. Vaughan*, 6 Vt. Rep. 243. *Staniford v. Barry*, 1 Aik. Rep. 321. *Essex v. Prentiss*, 6 Vt. Rep. 47.

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C. Adams, for complainant.—Although the power of a justice is very extensive, still, justices' courts are of limited jurisdiction, and their powers are to be strictly construed.

In courts of general jurisdiction, the time and place of holding the court are prescribed by a public act, and suitors consequently know when and where to attend. Justices appoint their own time and place of holding their courts, and parties are to look to the writ alone for information on these points. The writ is the commission of the justice to hold the court, and after it is served, he has no discretion as to the time or place. It will be admitted, he could not hold his court at any other place, and no distinction can be drawn between the *place* and the *time*.

There must either be some established rule, or every thing must be left to discretion.

If the justice, under any circumstances, can delay his coming to the place of trial, for four hours, he can delay in all cases, and if he can delay four hours, by parity of reasoning, he can delay more, and the consequence will be that suitors can know nothing certain as to the time of trial, and must either wait through the day, or be entrapped.

The opinion of the Court was delivered by

WILLIAMS, Ch. J.—The first question arises on the plea in abatement. It is alleged in the plea, that no security was given for cost, by way of recognizance. On examination, it is apparent that such a recognizance was taken by the authority issuing the writ, as is required by the 11th Section of the judiciary act, the condition of which is undoubtedly intended to secure the cost. The judges, who allowed and signed the writ, are not authorized, and would not have been justified in taking any other recognizance, or a recognizance with any other condition, than the one there presented. The statute of 1822 was not

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intended to apply to writs of *audita querela*. The object of that statute was, to require of the plaintiff, in the ordinary process by writ of summons, to give security for costs of prosecution. Before that statute, he was not required to give security for cost, if he was a freeholder and lived within the State. The intention of the statute was, to place the common writs of summons on the same ground as writs of attachment, so far as security for costs was required. But as, before that statute, no other recognizance, than the one given in the case before us, was required on the issuing of a writ of *audita querela*, whether the same issued as an attachment or a summons, or whether the complainant was a freeholder or not, none is required by the statute of 1822, before mentioned.

There is still another and a more important question, in the case before us, in relation to the proceedings before the justice of the peace, to set aside which, was the object of the *audita querela*. It appears that the suit of *Stacy v. Brown*, was, by the justice, adjourned until the 28th April, 1835, to be heard at the office of Mr. Haswell, at 9 o'clock, A. M.:—that Brown, the defendant in the suit, was present at the place, between nine and ten o'clock; but the justice was not there until nearly one o'clock, P. M.

It is obvious there must be some time, when the parties to a suit, before a justice, may consider their attendance dispensed with, if no magistrate appears, and no measures are taken to proceed with the suit. In New York it is held, that the parties are bound to wait a reasonable time, and if there is an unreasonable delay in the justice to attend, the cause is discontinued. *Taft v. Grosfent*, 5 Johns. Rep. 353. *McCarty v. McPherson*, 11 do. 407.

This leaves the question too uncertain and precarious. What would appear to be a reasonable time to one, might be considered differently by others; and a party to a suit should not be under the necessity of determining what is a reasonable time, at the hazard of having a final judgment rendered against him, on an *ex parte* hearing, if he judges incorrectly. It is also obvious, that it would be inconvenient and onerous to parties and witnesses, and contrary to all the provisions of the law in similar cases, to require an attendance during the whole of the day. A definite time is fixed by the statute, in which an entry must be made, a default or appeal taken, and within which a justice may

revive an action; and in analogy to this, the county court probably fixed upon the period of two hours as the time, within which, the justice should attend, when a cause has been continued. Whether the county court was correct, in fixing upon the period of two hours, as the time, within which the justice should appear and call up the suit, it is not required of us to decide, as the justice was absent during the whole of the half day, to which the suit was continued, and more than two hours from the hour appointed. In our law, in relation to justice courts, the period of half a day is recognized. Fees for attendance of witnesses and parties for half a day are established, and no more than the fees for half a day's attendance is allowed, when the judgment is rendered by default. We are all of opinion, that the absence and neglect of the justice to attend and call the suit, during the whole of the half day, operated as a discontinuance of the suit, and the judgment, rendered by him, was irregular. In this cause, the time fixed was in the forenoon, and there is no difficulty in determining the limit of the half day. Whether the parties, when the hour, to which a cause is adjourned, is in the afternoon, would be bound to attend until 12 o'clock, at night, or whether the afternoon would be considered as determining at six o'clock, which is the latest period at which a justice court may be appointed to be holden, (Stat. 1803, sect. 5, p. 136,) may admit of some doubt. In this case, however, from the facts, as found and established, there is no doubt the judgment of the County Court was not erroneous, and it is therefore affirmed.

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GEORGE A. ALLEN v. A. W. BUTLER, H. L. PEASLEE,
DAVID TYLER, and JOSEPH SINCLEAR.

In an action by the sheriff, against the receiptor of goods attached, the latter cannot set up, in defence, a want of the delivery of the goods to him, or that no such goods were attached.

In an action against several joint contractors, if one avails himself of infancy, as a defence, the plaintiff may proceed to judgment against the others, or may enter a *nolle prosequi*, as to the infant, and proceed against the others.

This was an action on a receipt, executed to plaintiff, in his official character of sheriff of Chittenden County, for goods and merchandise, taken on a writ of attachment, in favor of Emerson & Harvey, against A. W. Butler and H. L. Peaslee, two of the defendants. The receipt was also signed by L. G. Butler, who was joined in the suit, and pleaded his infancy, specially. The four first defendants pleaded the general issue, with notice. The jury returned a verdict against A. W. Butler, Tyler, Peaslee, and Sinclear, and in favor of L. G. Butler, on his special plea. The defendants introduced evidence, tending to show, that the agents of Emerson & Harvey turned out to the plaintiff, on the aforesaid writs against Butler & Peaslee, a store of goods in Essex, as the property of A. W. Butler & Peaslee, and that the plaintiff took possession of the goods in the store. The receipt in question was executed instead of a receipt for the goods actually in the store. The plaintiff made no inventory of the goods in the store, but returned an attachment of goods specified in the receipt, and gave up the custody of the goods. The defendants also offered evidence, tending to show, that immediately after the goods were taken, as aforesaid, they were, by an agreement of Butler & Peaslee, and the other defendants, put into the possession of David Tyler, and that, thereupon, the receipt in question was executed to the plaintiff. The defendant offered an attachment in favor of Boynton & Brooks, against the said Butler & Peaslee, which was executed in 1833, on the said goods. The attachment was made by Bliss, as plaintiff's deputy, but when Boynton & Brooks obtained their judgment, the execution was put into the plaintiff's hands, who sold some portion of the same goods on the execution, that were taken on the attachment in favor of Emerson & Harvey. This evidence was objected to by the plaintiff, and rejected by the court. The defendants also introduced evidence,

tending to prove, that a portion of the goods, turned out to the plaintiff by the agents of Emerson & Harvey, and of the same description of goods mentioned in the receipt, were subsequently taken out of the possession of Tyler, by the plaintiff, on Boynton & Brooks' attachment. The defendant insisted, that, as the store of goods, formerly owned by Butler & Peaslee, were, in point of fact, the goods actually attached by the plaintiff, and as the delivery of these goods to the defendants was the consideration of the receipt in question, and as the plaintiff had resumed possession of a part of the goods, he was not entitled to recover. They, also, insisted that the receipt was null and void, being an agreement to indemnify the sheriff for a breach of official duty, and further insisted, that if the receipt could be sustained, and the plaintiff was entitled to recover, the amount of the goods so taken, on Boynton & Brooks' attachment, at their cash value when taken, should be deducted from the amount of the judgment recovered by Emerson & Harvey, or, at least, the value of so much of the goods as are described in the receipt. But the court directed the jury to return a verdict for the whole amount of the judgment in favor of Emerson & Harvey. The defendants, A. W. Butler, Peaslee, Tyler, and Sinclear, after verdict against them and in favor of L. G. Butler, filed their motion in arrest of judgment, on the ground that the contract was made jointly by them and L. G. Butler, and so alleged by the plaintiff in his declaration, and, as the plaintiff had failed in proving a joint contract, he was not entitled to recover against any of the defendants. The motion was denied by the Court.

The defendants excepted, and the cause passed to this court.

J. Maeck, for defendant, contended, I. That the action could not be sustained. That all bonds, promises, contracts and agreements, the tendency and effect of which were, to induce an officer to neglect his duty, were void, and he cited Chitty on Cont. 221-2 1 Lord Raym. 279. 4 Mass. 370. 1 Caines' Rep. 450. 5 Mass. 385. Do. 541. 2 Vt. Rep. 347, and insisted that the contract declared upon was an indemnity to the officer for a breach of duty.

That it was a fraud upon the creditor. By taking the substituted receipt, the sheriff could not resume the possession of the property, in the event of the receiptors failing.

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II. The defendants ought to have been permitted to show that the sheriff subsequently took and sold the goods he delivered over to them. The delivery of the goods to them was the sole consideration of their contract to plaintiff, and a party cannot recover on a contract, where he has wilfully destroyed the consideration of it. To show the evidence admissible, he cited 2 Johns. 378. 3 do. 319. 5 do. 67. 8 do. 389. 9 do. 310. 11 Mass. 27. 1 Johns. Cas. 145. 3 Caines, 14.

III. That evidence was admissible, to show the plaintiff had subsequently taken and sold a portion of the goods, on the debts of other creditors of B. & P. If the receipt had been for the goods actually attached, there could have been no question. 5 Vt. Rep. 263. The plaintiff ought not to be put upon better grounds, by taking a random receipt than he would have been by taking a real receipt, nor ought the liability of the receptors to be greater.

IV. The plaintiff is not entitled to judgment on the verdict, unless he recovers against all he sets up as parties to the contract. Though one defendant prevails on a plea of infancy, the rule is the same. 5 Esp. Rep. 47. 4 Taunt. 468. 3 Taunt. 307.

C. Adams, for plaintiff.—I. The receipt, executed by the defendants, is evidence that the property, specified therein, was attached by the sheriff and delivered to the defendants. *Jewett v. Torry*, 11 Mass. Rep. 219. *Lyman v. Lyman*, *ibid.* 317. *Bridge v. Wyman*, 14 do. 190. *Spencer v. Williams*, 2 Vt. Rep. 209. *Lowry v. Cady*, 4 do. 504.

II. A consequence, resulting from the above proposition is, that any and all other property, owned by the original defendants, is liable to be attached and taken by any other creditor.

III. The fact that the *store of goods* of the original defendants was first taken into possession by the sheriff, is of no importance, as it was immediately abandoned, and, therefore, became liable to claims of creditors, in the same manner, as if it had not been taken into custody.

IV. The store of goods, and all other property of the original defendants, not mentioned in the receipt, being liable to the claims of their creditors, the sheriff was bound to execute the subsequent processes, and, therefore, the taking of the goods, on the attachment of Boynton & Brooks, was not, in law, a resuming of the property specified in the receipt.

V. There is nothing in the point, that the receipt is to be considered as an indemnity for a breach of official duty. The argument defeats itself. It must proceed on the ground, that the sheriff is not bound to take a receipt, in any case, and the consequence would be, that a delivery of goods, actually attached, when the purpose is that they shall remain in the hands of the debtor, would be void.

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But this has been too long established to be questioned. So long as property is liable to attachment, it is a convenient practice to allow it to be receipted, and no evil has resulted from it.

VI. We might go further, if the case required it, and, contend that a retaking of the identical property by a *second process* does not release the previous receiptors.

Where property is attached and delivered to a bailiff, it would not be liable to the claims of creditors, for the simple reason, that it is not in the possession of the defendant, but of the sheriff, that is, if attached, it must be subject to the first attachment. But the legal effect of ordinary receipts is that of a replevin. It remains in the possession of the defendant, and those, who join in the receipt, are mere sureties, and not bailiffs of the sheriff.

Whenever the goods are liable to the claims of creditors, the sheriff must take them at his peril, if directed. If they could be taken by a constable, the sheriff would be liable on his refusal. When the sheriff delivers goods to a bailiff, he does not part with the possession, and of course, can retake the goods at pleasure, either with or without the process, but when he parts with the possession, and the goods get back into the hands of the original defendants, whether by a replevin, or on a receipt, they are liable to the claims of creditors, the same as if they had not been attached.

VII. The judgment in favor of Lorin G. Butler, on his plea of infancy, is no ground of defence for the other defendants.

Infancy is a personal privilege, of which none but the infant can take advantage. One defendant cannot plead the personal privilege of a co-defendant in bar. A discharge of one defendant, under the insolvent debtors' act, will not discharge the other. *Nadin v. Battie, et al.* 4 East. 147. In *Noke & Chiswell v. Ingham*, 1 Wilson, 89, it was said the discharge of one bankrupt is a personal privilege—it did not go to the action, and therefore did not aid the other defendant. The same doctrine was held in *Tooker v. Bennett*, 3 Caines' Rep. 4.

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This precise question is well settled in the State of New York.
Van Bramer v. Cooper, 2 Johns. Rep. 279. *Hartness v. Thompson*, 5 Johns. do. 160.

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The suit was properly brought against all, and if Lorin G. Butler had not pleaded his infancy, judgment might have been rendered against him.

The opinion of the Court was delivered by

WILLIAMS, Ch. J.—It has been settled by repeated adjudications in this state, that, in an action by the sheriff against the receiptor of goods, returned as attached, the latter cannot, in defence, allege the want of a delivery of the goods to him, or that no such goods were attached. He is precluded from such defence, by the acknowledgment in the receipt. However strong may be the objections against the propriety of the proceeding, on the part of an officer, who returns an attachment of goods, of which he never took the possession, or which never had any existence, yet the persons, who acknowledge in writing the receipt of the goods, described as legally attached, are not permitted to deny the actual receipt, or contest the validity of the attachment. This disposes of the first question presented, as also of the question in relation to the admissibility of the parol evidence offered. The evidence, if admitted, could not avail the defendants.

It did not tend to shew any failure of consideration, or to bring the case within the principles established by the court, in the case of *Beach v. Abbott et al.* 4 Vt. Rep. 605. The plaintiff, by the attachment, made at the suit of *Boynston & Brooks v. Butler & Peaslee*, did not resume the possession of goods by him formerly attached and delivered to the defendants in this suit, and if any goods were delivered to the present defendants, they were delivered by Butler & Peaslee. The consideration, which passed between the plaintiff and defendants, for the receipt, was the liability of the plaintiff to Emerson and Harvey, the creditors in the first attachment.

The remaining question has never, to our knowledge, been directly decided in this State. It appears that the suit was instituted against five defendants;—that they severed in their pleas; one of them, viz. Lorin G. Butler, having pleaded infancy. Upon this plea, a verdict was rendered in his favor, and against the other defendants, upon their plea; and the question

is, whether the plaintiff can take judgment against the other defendants. It might be of no importance, in this case, to discuss the question, whether the contract of an infant is void, or only voidable; although it would seem, that the case of *Gibbs v. Merrill*, 3 Taunt. 307, can only be supported on the ground that such a contract is voidable. The cases in England have established, that where an adult and an infant join in a contract, a suit must be brought against the adult alone; and if he pleads in abatement, that the infant was a party to the contract, and not joined, the plaintiff may reply, that the other contractor was an infant. *Burgess v. Merrill*, 4 Taunt. 468. If they are joined, and insist on the infancy of one of the defendants, the plaintiff cannot avoid the consequence by entering a *nolle prosequi*, as to the infant. A different rule prevails, where one of the joint contractors becomes a bankrupt. 1 Wilson, 89. Chitty has laid down the rule, that where one of the defendants is discharged from liability, by matter *subsequent* to the making of the contract, the plaintiff may recover against the other defendants, and enter a *nolle prosequi* as to him who pleads the discharge. 1 Chitty, 32, 33. In the notes to 1 Saunders, 207, a. it is said that, if in such actions the defendants sever in their pleas, as where one pleads *some plea, which goes to his personal discharge*, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. Whether there is any such qualification to the rule "that the plea must be one, going exclusively in personal discharge, and not to the merits, has been questioned by Justice Story, in the case of *Miner v. Mechanics' Bank of Alexandria*, 1 Peters, 76.

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In England, when one of the joint contractors is discharged by his certificate of bankruptcy, they must all be sued, or the defendant may plead the nonjoinder in abatement. The plaintiff is not at liberty to anticipate, in the first instance, what may ultimately, perhaps, be a discharge. *Bovill v. Wood*, 2 Maule and Selwyn's Rep. 23.

There seems to be no good reason why the same principle should not apply in the case of infancy. The plaintiff should not be bound to anticipate, not only that one of his joint contractors may prove to be an infant, but that he will avail himself of that defence. It would be extremely inconvenient, in a doubtful case as to the age of one of the parties to an instru-

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ment, that the plaintiff should incur the risk of being able to prove the age, at the hazard of being turned over to a new action. Under our attachment system, something more than a bill of cost frequently is lost, by abandoning one suit for another.

But, whatever may be the rule in England, in this country a rule, better calculated to answer the ends of justice, has been adopted. In *Hartness v. Thompson*, 1 Johns. Rep. 160, it was held, that in a suit against three, on a joint contract, where the defendants jointly pleaded *non assumpsit*, and gave in evidence the infancy of one of the defendants, the jury may find a verdict for the infant defendant, and against the others; or the plaintiff may enter a *nolle prosequi* as to the infant, and proceed as to the others. A similar decision has been made in Massachusetts. In the case of *Miner v. Mechanics' Bank of Alexandria*, before alluded to, it was decided by the Supreme Court of the United States, in an action against several defendants, on a joint and several bond, who severed in their pleas, that the plaintiff might enter a *nolle prosequi* as to one, and take judgment against the rest. The principle, involved in the case, was fully investigated by the learned Judge, who delivered the opinion of the court, and Judge Johnson, who dissented from the opinion of the court, admitted, that, in a case similar to the one under consideration, the plaintiff might proceed against the adults. His language is, "if this plaintiff ever had a right to proceed against these four defendants, in originating the suit, I should have felt no doubt. That is the case in trespass; that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*."

From our examination upon this subject, we are disposed to adopt the rule, which has been adopted in other countries, and to decide, that this action was correctly brought against all the persons named in the receipt, although it might have been commenced against the adults alone;—that one of the joint contractors having availed himself of his infancy, in a separate plea, which has been found in his favor, the plaintiff may take judgment against the other defendants.

The judgment of the County Court is, therefore, affirmed.

FRANKLIN COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. STEPHEN ROYCE, }
 " SAMUEL S. PHELPS, } *Assistant Justices.*
 " JACOB COLLAMER, }
 " ISAAC F. REDFIELD, }

MARY SISCO v. LATHROP HARMON.

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A prosecution, under the statute, may be sustained by the overseer of the poor, against the putative father of a bastard child, in the name of the mother, though said mother, after the birth of said child, was married, and at the time of the prosecution, was a *feme covert*, her husband joining in said prosecution, by joining with her in the written request and prayer for the warrant.

In prosecutions for bastardy, the practical construction of the statute has been to permit copies of the proceedings, before the magistrate, to be used in the county court. And this *seems* to be the proper course. But this court, as a court of error, has nothing to do with this question, as it is purely a matter of practice, to be regulated by the county court, by its own rules.

This was a prosecution for bastardy. The complaint was as follows :

"To Joel Barber, jun., one of the justices of the peace, with-
 "in and for the county of Franklin, comes Mary Sisco, now
 "wife of Erin Sisco of Fairfield, in said county, late Mary
 "Bickford, and, on oath, and in writing, complains, informs, and
 "gives said justice to understand, that on or about the first day
 "of September, 1834, at Fairfield aforesaid, one Lathrop Har-
 "mon, then of Sheldon, in the county of Franklin, and now of
 "Windsor, in the county of Windsor, did beget a child upon the
 "body of the said Mary Sisco, then Mary Bickford, and a
 "single woman, which said child was, on the 28th day of
 "May, 1835, and before the inter-marriage of the said Mary,

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"with the said Erin Sisco, born a bastard, and that said child is
"now living, and the said Lathrop Harmon is the father of said
"child. Whereupon, she prays that warrant issue." &c.

Signed and sworn to.

Immediately following the complaint was the following :

"Franklin County, Fairfield, Sept. 16, 1835.

The undersigned; Erin Sisco, hereby represents to the said Joel Barber, jr., justice of the peace, that on the 27th day of June, 1835, he was duly and legally joined in marriage to the aforesaid Mary Bickford, and that she is now his lawful wife, and that he unites with her in the prayer that a warrant, in due form of law, go forth against the said Lathrop Harmon, to bring him before said justice, to answer to the foregoing complaint."

(Signed.)

"ERIN SISCO."

Then follows a warrant in common form, and a certificate of the overseer of the poor of Fairfield, stating that he, considering the town likely to become chargeable with the maintenance of said child, had commenced and should control the prosecution, &c. Then follows the justice's record, showing that said Lathrop was brought before him, on said warrant, and gave bond, by way of recognizance, to said Mary Sisco, for his appearance before the county court. All this is then certified by the justice, to be a true copy of the complaint, warrant, and other proceedings.

Before the county court, the defendant filed the following motion. "And now the said Lathrop comes and moves this honorable court, that this suit, and the proceedings therein, be dismissed, quashed, and held for nought, and he may have his cost adjudged to him, for the causes following, and for other causes, apparent on the proceedings in said suit.

I. For that said Joel Barber, jr., has certified copies of certain proceedings, had before him, as a magistrate, which copies cannot be the ground of proceedings against said defendant, in this court.

II. For that it appears by the complaint, in this case, that Mary Sisco, complainant, was a married woman, at the time she made the complaint, and the husband is not joined in the prosecution.

III. That the the recognizance was taken to Mary Sisco.

IV. That the whole proceedings are anomalous, irregular and contrary to law.

The county court, thereupon, adjudged that the proceeding

be quashed, to which the plaintiff excepted, and the case passed to the Supreme Court.

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Smith & Aldis for the plaintiff.

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I. The statute makes no provision, whether the *original* proceedings, or a *certified copy*, be sent up by the magistrate, and no good reason can be urged, why the original proceedings should have been returned to the county court, in this case, more than in civil cases, where an appeal is taken, or in criminal cases, where the respondent is bound, by way of recognizance, to appear before the county court, to answer to the charge made against him, before the magistrate. The 6 sec. of an act, establishing permanent salaries, &c., Statute, 304, makes it the duty of every justice of the peace, to make correct, true, and lawful records, of all judgments by him rendered, and *other official business by him done*, required by law to be recorded, &c. Certified copies, then, of the proceedings, and not the originals, is what the law requires to be sent up from the magistrate, to the county court.

II. In the case under consideration, the woman was *single* at the time the child was born, and could not, by an after marriage, defeat the town of their rights to prosecute in her name. A town, chargeable or likely to become chargeable, with the support of a bastard child, is authorized and empowered to prosecute in the name of the mother, and no compromise is valid, made between the mother and father, without the consent of the overseers. No act of the mother, whether it be a discharge to the father, or marrying any other man, can defeat the town of their rights against the father of the child. The legislature did not intend that a marriage of the mother, *after* the delivery, should be a discharge of the person, who is charged as the putative father. "If the woman die, or be married, *before* she be delivered, this will operate as a discharge.

III. The husband cannot, from the nature of the case, be a party to this prosecution.

The facts, which the statute requires to be set forth in the complaint, and sworn to, are such as no one but the mother can know or swear to. There is no one act, which the law requires to be done, in getting up the proceeding, or in prosecuting it, that can be done by any one but the mother.

All that the husband could do, has been done in the case. He has united with his wife in the prayer that a warrant be granted.

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IV. If the recognizance could not be taken to the complainant in this case, it certainly could not be taken to any one. The statute requires the recognizance to be taken to the *said woman*.
Smalley & Adams, for the defendant.

I. The first objection to the proceedings is founded on a construction of the 1st section of the act, as to the duty of the magistrate. His duty, under this section, is merely ministerial to issue his warrant, and take the recognizance required, and send it to the court. Unless he is required by law to keep a record of his proceedings, he is not empowered to make a copy of them evidence, for any purpose.

The warrant and whole proceedings are void, for want of the preliminary requisites, giving the magistrate jurisdiction.

The action, being founded on a special statute, and not on general principles, is not to be favored, and cannot be sanctioned, unless the prosecutrix brings herself clearly within the act.

By the act, the proceedings must be on the oath of a *single woman*; and all the provisions of the act are manifestly intended for a single woman. The court will not give a forced construction to the act, and undertake to afford relief on any other terms or conditions, than such as are provided by it.

The words of the act are clear, that the warrant is to issue on the charge in writing of a single woman; and it would be quite as consistent with the letter of the act, for a magistrate to issue a warrant, on the application of an executor or administrator of the mother of an illegitimate child, as upon the application of her husband.

This question was virtually determined against the plaintiff, in the case of *Gaffery v. Austin*, 8 Vt. Rep. 70. For if the act is to be extended, to give a remedy for cases of bastardy, not included in the terms of the act, there would seem to be no good reason for refusing relief in the case of one born during coverture.

In England, the proceeding is a criminal prosecution, for the punishment of the offender, and the relief of the parish. *Rex v. Taylor*, 3 Bur. Rep. 1679. *Hill v. Wells*, 6 Pick. Rep. 104. And the cases in their courts are grounded on this principle, that the object of their statutes is to punish the crime of incontinence, and relieve the parish from its consequences. Hence the words of the act of 18th Eliz. "*born out of lawful matrimony*" have received a liberal construction, and have been held

to embrace all children, that can be shown not entitled to the rights of legitimacy.

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III. Admitting that a married woman can prosecute a suit on this statute, still she must prosecute in the name of her husband.

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IV. If Sisco and his wife have a cause of action, for his wife's illegitimate children, the suit is under his control.

As the husband takes the wife with all incumbrances, he certainly ought have the benefit of the prosecution of all rights secured to her.

V. The recognizance is void, having been taken to Mary Sisco.

The opinion of the Court was delivered by

COLLAMER, J. The first ground of objection to this proceeding, is, that *copies* of the proceedings before the magistrate, were used in the county court, instead of the original papers. The practical construction of the statute has been, to use copies. And perhaps this is the proper course, as the recognizance, taken before the justice, is matter of record, and the original should remain with him. But with this question, this court, as a court of error, have nothing to do. It is a matter of practice, to be regulated by the county court, by its own rules. There may be many cases, where the county court may receive copies, as substitutes for originals, such as where the originals are destroyed or lost, and many others. Now to show that that court committed an error, the exceptions must show that no such state of circumstances existed, or this court will, in this case, as in all others, presume all was correctly done, until the contrary appears. For any thing, which appears in this case, the county court committed no error, in law, in receiving and acting upon copies, even if the law ordinarily required the original papers in such a case.

The main question, however, arises from the fact, that Mary Sisco was a married woman, when this prosecution was instituted. In the case of *Gaffery v. Austin*, decided in this court on the last winter circuit, the woman was married when the child was begotten, and the prosecution was by her alone, the overseers having no part in it. It was insisted that such an action could be sustained, if *non access* of the husband could be shown, because this could be done in England, under their statute. This the court overruled, for many reasons, and among those, which operated upon my mind, were these. In England,

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the proceeding is for the punishment of incontinence, and the security of the parish. In this State, and under our statute, it is, in the first instance, in the name and behalf of the woman, to aid her in the support of the child. There the prosecution is in the name of the king, and the order is made on both the father and mother, as a criminal proceeding. Here it is entirely different; no proceeding can be had against the mother. There the woman, in testifying to her adultery, subjects herself to no civil penalties. Here, adultery is a deeply criminal offence. To sustain such a prosecution by a married woman, even with her husband, would open the door for such prosecutions, to compel contribution for the support of all children, begotten and born in lawful wedlock; and that, too, in behalf of parents, bound by law for their support. To sustain it, in her behalf alone, without the joinder of her husband, if the judgment was against her, would subject her to imprisonment for costs, in violation of the marital rights of the husband.

This is entirely a different case. It is not a suit by the woman alone. It is not to bastardize a child, begotten or born in lawful wedlock. It does not require the woman to criminate herself, on oath, to sustain it, nor can any judgment or order, which may be made in it, be for the relief of the husband, as he is not, by law, bound to maintain this child of his wife. 4 T. R. 118. It is obvious then, that this is entirely a different case, and clear of all the great difficulties and objections in the other case.

It is, however, insisted that the statute is entirely confined to the case of a *single woman*, and that she must not only be such when the child was begotten and born, but at the time of the prosecution.

The object and purpose of this act are very obvious. It is to compel contribution from the putative father of a bastard child, that is, *one begotten and born out of lawful wedlock*, (1 Bla. Com. 454,) in aid of the mother or the town, which is bound to its support. Such a construction should be put on the statute as will effect this object, if this can be done without violence to its expressions, and so far as will not compromise legal principles, or put in jeopardy other great legal rights. The statute provides "That when any single woman shall be delivered of any bastard child, or shall declare herself to be with child, and that such child is likely to be born a bastard; and shall, in either

"case, charge any person, in writing, and on oath, with having "gotten her with child, and being the father of said child," &c. Now to what does the term, *single woman*, apply? To what, *point of time* does it refer, in these proceedings? There are two states of circumstances here mentioned, in either of which the proceeding may be taken, to wit, a single woman must have been delivered of a bastard child, or a single woman must, on oath, declare herself to be with child. In the nature of the thing, then, if proceedings are taken, that is, if the complaint and oath are made in the latter case, she must not only have been a single woman, when the child was begotten, but must be still a single woman, when she makes the oath and complaint; and this should appear. But in the former case, if a single woman has been delivered of a bastard child, there is nothing which requires that she should remain such, when the oath is made, and the proceeding is taken. Such was this case.

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A further objection is made, that this complaint is by the woman only; that her husband is not joined. This is entirely a civil proceeding, and if the prosecutrix is an infant, she must sue by guardian or *prochein amy*. *Hinman v. Taylor*, 2 Conn. Rep. 357.

By our statute, the prosecution is given to the mother, in the first instance. The overseers of the poor have the right to institute the suit and prosecute it, or to take the control of one, by her commenced, but, still, it must be prosecuted in the name of the woman. Such is the only form of proceeding, recognized by the statute. This was a prosecution by the overseer of the poor, and the husband did join; so far as the form of proceeding, recognized by the statute, would permit. To require more would practically defeat the object of the statute, in giving security to the town.

By the 4th Sec. the statute provides, that, if the woman marry *before delivery*, it ends the prosecution. This clearly implies, that a marriage afterwards, as in this case, will not have that effect. If a marriage is entered into before delivery, the child will be *born in lawful wedlock*, and in law, is not a bastard, and the husband is bound to its support. But if the child is born before marriage, as in this case, it is a bastard, and the town, and not the husband, is bound for its support. In such case, the town is entitled to the aid from the putative father,

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which the statute gives, and of this right it cannot be defeated by the marriage of the woman.

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Judgment Reversed.

Cause remanded to the County Court.

ROYCE, J. Dissenting.

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OEL ANDERSON v. NORMAN DAVIS.

1. A promise to pay the debt of a third person is a collateral promise, and within the statute of frauds, and must be proved in writing, if the original debtor still remains liable for the debt; but if, by the terms of the contract, the original debtor is discharged, and it remains no longer a debt against him, it is an independent contract, and not within the statute.
2. In such case the original debtor is not a competent witness for the plaintiff.

This was an action on book, which, after judgment to account, was referred to an auditor, by the County Court. By the auditor's report, it appeared that the defendant contracted with one Lamb, to erect a certain building, at a certain price. Afterwards, Lamb engaged the plaintiff, as his partner, of which the defendant had no notice. Lamb and the plaintiff worked on the building, for a time, when Lamb was taken sick, and the work ceased. The plaintiff then called on the defendant, who promised to pay him for the work, by him already done, and the days work he should afterwards do. The plaintiff's account includes both. On the hearing, before the auditor, the plaintiff, to prove his case, and the defendant's undertaking, introduced the said Lamb, as a witness, to which the defendant objected, but he was admitted by the auditor, and testified. The County Court accepted the auditor's report, though excepted to, and rendered judgment for the plaintiff, for his whole account—to which the defendant excepted, and the cause passed to the Supreme Court.

The opinion of the Court was delivered by

COLLAMER, J.—The first question, arising on this report, is this; can an action be supported by the plaintiff for his labor, done before the defendant's promise, except by proving that

promise in writing, and by an action of special assumpsit thereon? In the case of *Harrington v. Rich*, 6 Vt. Rep. 666, the Judge, in delivering the opinion, remarks, that it has not been settled under our statute, as it has in England, that, if in taking the new promise the original debt becomes discharged, the promise is not within the statute of frauds. That is now the question. There was no original privity between these parties. The defendant employed Lamb, and Lamb employed the plaintiff. To Lamb alone could the plaintiff look for his labor, up to the time of the defendant's promise to the plaintiff. There is no pretence that the promise was in writing, and, if it is within the statute of frauds, the plaintiff cannot recover. If the defendant became holden to the plaintiff for this claim against Lamb, as collateral to Lamb, and the claim still remained against Lamb, it was within the statute. But if the defendant was to assume the debt, and he, alone, to be holden, and Lamb to be discharged, then the contract was not collateral, but independent, and not within the statute, and required no note in writing nor special action therefor. This is fully settled in England, *Goodman et al. v. Chase*, 1 B. & A. 297, and in the State of New York, (*Kent, C. J. In Leonard v. Vredenburg*, 8 Johns. Rep. 29,) upon statutes, of which ours is a transcript, and no reason is seen why ours should not receive the same construction. The report is not so clear on the point, whether Lamb was to be further holden, as could be desired; but assuming that the contract was, that the plaintiff was to have no further claim on Lamb, and that this was what constituted the consideration for the defendant's promise, together with the plaintiff's continuing his work, this brings us to another point in the case.

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On the trial, the plaintiff proved his case, in whole or in part, including this contract between the parties, by the testimony of this same Lamb, though objected to by the defendant. It has already been shown, that the plaintiff, in proving his case, must show, in effect, that the defendant assumed this claim against Lamb, on whom the plaintiff was to have no further claim. This would entirely release Lamb, as he would thereby be clear from the plaintiff. Lamb had no claim on the defendant, as he never completed the building, and the defendant, even if he paid the plaintiff, would have no claim on Lamb, as the latter never requested such payment. This was a result, which Lamb was directly interested to produce, and which a recovery by the

Franklin, January, 1837. plaintiff would produce. Lamb was, therefore, not a competent witness for the plaintiff.

Judgment Reversed.

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Report Recommended.

Smalley & Adams, for Plaintiff.

_____ for the defendant.

ASHBEL SMITH V. POLLY BENSON.

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One tenant in common cannot convey a part of his interest in the estate, by metes and bounds, without the consent of the co-tenant.

The levy of an execution, upon a *part* of the interest of one tenant in common, should be upon an aliquot portion of the tenant's entire interest, and if not so made, but upon the tenant's entire interest in a portion of the estate, described by the metes and bounds, it is *void*.

Damages in ejectment can never be recovered, unless the *land*, or some portion of it, is recovered.

This was ejectment for lands in Highgate. The plaintiff's title was derived by virtue of the levy of an execution in his favor against Abijah Benson, on the interest of said Abijah, in the land in controversy, as tenant in common with the defendant. It was admitted that the defendant and said Abijah were tenants in common of a tract of land, of which this now in dispute was part, and that it was set off by plaintiff, on his execution, and described by metes and bounds. The question to be determined is the sufficiency of such a levy. It was admitted that defendant had always refused to recognize plaintiff as tenant, in common, of any portion of the land, and, against his will, had taken the profits of the whole estate.

The County Court held the levy void.

Smith & Aldis, & O. Stevens, for plaintiff.

1. The levy is good against Abijah Benson and those claiming under him. *Varnum v. Abbott and others*, 12 Mass. Rep. 474.

2. If the levy is good against Abijah Benson, and all his right and title to the land in question passed to the plaintiff, and, along with it, the right, that Abijah had to the possession and occupancy of the land, as co-tenant with Polly Benson, the de-

defendant, then it would follow, that, if Polly Benson should refuse to let the plaintiff occupy the land in question, in common with her, and claim, as in this case, to hold the premises adversely to the plaintiff and to his title, it would amount to an ouster, and the plaintiff could maintain his action.

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Abijah Benson, before the levy, had as good a right to occupy the land in question as his co-tenant, the defendant, and the plaintiff has now the same right. Abijah Benson could not, before the levy, nor can the plaintiff, now, exercise any right to the land, or do any act inconsistent with the rights of Polly Benson. Still he is entitled to his proportion of the rents and profits. *Bartlet v. Harlow*, 12 Mass. Rep. 354.

A possession by the plaintiff, in subserviency to the rights of Polly Benson, is consistent with the very nature of the estate claimed by the parties, and the levy would only be rendered inoperative, as against Polly Benson, when a division should take place and the land be set to her. *Galusha v. Sinclear*, 3 Vt. Rep. 399.

Again. The right to occupy in common with the defendant must be either in Abijah Benson or the plaintiff, who holds by virtue of the levy. It is clear, that Abijah Benson has no right to occupy the land, neither can he petition for a partition. All his right and interest in the land is gone.

Now, if the plaintiff has neither the right to possess in common with the defendant, or to petition for partition, then it may be asked, who has this right? Or is it true that the right, which Abijah Benson had in the land, has, in consequence of the levy, become extinct, so that it never can be enforced, either by himself or those, who claim under him, as against his co-tenant?

It may be said that, although Polly Benson is accountable to the plaintiff for the rents and profits, still *this action* cannot be maintained. This is not true, for the plaintiff would be required to show the same title, in order to maintain an action of account, as he would to maintain ejectment. The right to occupy, by one co-tenant, is the very ground on which the other is liable to account for rents and profits.

S. S. Brown, for defendant.

The levying creditor could not set off a part of the tract, by metes and bounds, but should have taken such an undivided part of the whole, as his execution bore to the value of the whole tract. 1 Swift's Dig. 155.

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This by a fair construction of the statute is the proper mode of levying. Vt. Stat. 212. Sec. 7.

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This construction has been given to the statute in Massachusetts, which is the same as ours. *Bartlet v. Harlow*, 12 Mass. Rep. 348.

A joint tenant cannot convey his interest in a part of the land, by metes and bounds, as it would amount to a severance, but must convey such a proportion or undivided share of the whole. And this principle, if correct, decides the present question. *Porter v. Hill*, 9 Mass. Rep. 34.

The mode of levying on property in common is well settled in Massachusetts and Connecticut, and such a levy, as the one in question, would be void in those States, and the levying creditor could not sustain a petition for a partition. *Ballwin v. Whitney*, 13 Mass. Rep. 57. *Nay v. Drake*, 9 Pick. Rep. 35. 1 Swift's Dig. 155. *Starr v. Leavitt*, 2 Connecticut Rep. 245.

And, in accordance with the cases, above cited, is that of *Galusha v. Sinclear*, 3 Vt. Rep. 394.

The opinion of the Court was delivered by

REDFIELD, J.—This question has never been directly before this court for adjudication till now. In the case of *Galusha v. Sinclear*, 3 Vt. R. 394, an opinion is expressed, *arguendo*, that such a levy, as the present, would not be valid. This opinion of the late Chief justice has, to a considerable extent, gained the confidence of the profession, as being founded in sound reason.

When the levy of an execution or deed of conveyance is extended over the entire interest of the tenant, no question ever arises. Most of the conveyances by tenants in common, found in the books, are of this character. I find no authority, at common law, for a conveyance by one tenant in common, of a portion of his interest in the common estate, by metes and bounds. The intimations referred to by Jackson, Judge, in his opinion, in the case of *Bartlet v. Harlow*, 12 Mass. 348, as found in Coke and Coke Littleton, and Viner's abridgment, are wholly unsatisfactory. If any such mode of conveyance was ever attempted at common law, no case has come up for judgment, involving that question. It is laid down by all the early writers upon this subject, that one tenant in common, or joint tenant can do no act prejudicial to the common estate. Hence, it has been inferred, he could not convey a portion by metes and

bounds. And in Massachusetts and Connecticut, the doctrine is well settled, that such conveyance is void. *Porter v. Hill*, 9 Mass. 34. *Mitchel v. Johnson*, 4 Conn. Rep. 495. *Giswold v. Johnson*, 1 do 363. In both those States, too, a levy of execution, in the same manner, is held void. *Starr v. Leavitt*, and *Henman v. Leavenworth*, 2 Conn. Rep. 243 and note, and *Bartlet v. Harlow*, *ubi sup.* We are inclined to adopt the doctrine of these cases.

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We know that the argument *ab inconvenienti* is one not very difficult to be had, in a science composed of difficulties and doubts, and, therefore, not an argument of much weight in most cases. But in the present instance, it does seem not a little perplexing to resist its force. If one tenant in common is to be permitted to convey his portion of the estate, by separate parcels, to more than one, he may to any number. And if these conveyances are valid, the co-tenant is bound to make partition with each of these separate grantees, and an estate, which originally was valuable, with the right to compel partition with one only, becomes wholly worthless, from the obligation to submit to perpetual sub-division.

Before the statutes of Henry VIII, and William III, tenants could not be compelled to make partition of their lands. The mode of conveyance then, while the estate must still be held in common, unless all the proprietors consented to partition, was not very important. But after the compulsory partition, provided by these statutes, which exists with us also, it became almost indispensable to the rights of co-tenants, that they should not be compelled to submit to repeated sub-divisions of the entire estate. Under this process, the separate parcels might not be adjoining each other, and thus be rendered more or less useless, under different circumstances. It is not necessary to state extreme cases. Almost no case can be supposed, that will not expose the co-tenant to injustice, which will be prevented by requiring the conveyance to be of an aliquot portion of the entire interest. The arguments, which have been named, apply with still greater force to the case of a levy of execution. This is a conveyance by operation of law, and should not be allowed, except where the estate might be so conveyed by the debtor. It is a conveyance *in invitum*, and it will, therefore, be still more unreasonable to subject the co-tenant to the caprices of fifty creditors, than of his co-tenant, whom he may be said, in some

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sense, to have selected. If this mode of conveyance is allowed, it will put it in the power, not only of the tenant, but of his, creditors, very materially to control the partition, not in accordance with the statute, but their own whims.

It may be true, that this levy will operate as an estoppel against the debtor, Abijah Benson, and, had partition been made, it might enable the plaintiff to hold so much of the land as fell to the share of the debtor. But that case is not now before us. The claim to recover rents and profits, in this action, even although the court should not consider the levy valid, is ill founded. In the action of trespass and ejectment, as our action of ejectment is sometimes denominated, *mesne profits* are recovered only in those cases, when at common law the action of trespass for *mesne profits* would lie, i. e. when there had been a recovery in ejectment. The recovery of damages, in this action, is but an incident of the recovery of the land. If the plaintiff fails to recover the principal, he must of course fail to recover the incidents.

As we consider the levy insufficient to convey the land, the judgment of the Court below is affirmed.

ARCHIBALD McCOLLUM v. IRA HINCKLEY, and AURELIA
 WILLIAMS, Executors of JESSE WILLIAMS, and LYMAN
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Debts, not presented to the commissioners on insolvent estates, are barred, whether the creditors reside within the State or not.

If a creditor of such estate, with surety, refuse to present his claim to the commissioners for adjustment, when requested so to do, by the surety, the surety will be released from his liability.

But where he applies to a court of Chancery, before the suit is brought, as he may do, to be released from his obligation on such debt, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditors, the deficiency, out of which the surety will be permitted to deduct his costs, and the balance, if any, be paid to the creditor.

If the creditor, by mere negligence fail to present his claim to the commissioners in time, so that he loses his remedy against the estate, the estate being in fact solvent, it would seem, he could not afterwards recover of the surety.

At all events, chancery will not interfere in his behalf, to enable him to obtain a decree against the estate, on the ground of the primary liability of the surety, and the ultimate liability of the estate. Such possibility of action, in the surety, if it exist, not being one of those trusts, which the creditor can compel him to surrender to his use.

The bill, in this case, alleges in substance, that Jesse Williams, in his life time, was indebted to the orator in a considerable sum, for which he executed his promissory note, and procured his son, Lyman Williams, to sign with him, as surety. Jesse Williams deceased, his estate was represented insolvent, commissioners were appointed, and the orator, residing in the Province of Lower Canada, had no notice, in fact, of the proceedings, and did not present his claim. The commission was closed. The estate proved sufficient to pay the debts, including the orator's, and assets remain in the hands of the Executors, sufficient for that purpose. The defendants, the executors, answered, and the bill was taken "*as confessed*," against Lyman Williams. The case was heard on bill, answer and traverse, and the court considered the facts above alleged, as set forth in the bill, as substantially found in the case, and it was considered and decided accordingly.

Smalley & Adams, for orators.

The surety, Lyman Williams, may either pay the money and then bring his action at law against the executors, to compel a payment of the claim, or, without paying the money, he may

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bring his bill in this court, and compel the executors to discharge it, before he has been called on for payment. Law Library, 1 Vol. 135.

This estate, therefore, being ultimately and indirectly liable for the payment of the debt, this court will, on the well established principle of preventing a circuity of action, interfere, and compel the payment of the same, directly from the executors to the orator. Francis' Maxims, 36. *Riddle & Co. v. Mandeville and Jamieson*, 2 U. S. Cond. Rep. 268.

Though the orator's claim upon the estate of Jesse Williams is barred at law, yet as the surety has a lien upon the estate in the hands of the executors, the orator is at liberty to avail himself of the surety's lien upon this fund, to compel payment of his debts, upon the principle that the creditors shall have the benefit of all counter or collateral securities, given by the principal to the surety. *Maure v. Harrison*, 1 Bridg. 299. Eq. Abr. 93. *Wright v. Morley*, and *Morley v. St. Albans*, 11 Ves. 22. 3 Bac. Abr. 701. 1 L. L. 151.

The rule that the surety shall have the benefit of all the securities, taken by the creditor, and that the creditor shall have the benefit of all the securities taken by the surety, is reciprocal. See cases above cited.

John Smith, for defendants.

It is a well settled rule in Chancery, that, in cases of contract, equity will relieve against forfeitures, introduced by the parties, but when created by statute, or when arising from the breach of conditions in law, no relief can be given. 2 Swift's Dig. 16. 1 Ball & Beatty, 47. 373.

The section of the statute referred to is as binding on *this court*, as it is on a court of law, and a court of equity can no more relieve against it, than they can against the statute of limitations, or the provisions of the statute in relation to usurious contracts. The fact, alleged by the orator in his bill, that he resided in the province of Canada, was ignorant of the laws of this State, and had no notice of the sitting of the commissioners, if true, could not operate to exempt him from the provisions of the statute. The orator, as well as every other person, is bound to know the statute, and is, in all cases, presumed to have notice, when the commissioners have given such a notice as the law required.

The orator has an adequate remedy at law, for the recovery

of his debt. Lyman Williams, one of the signers of the note, for any thing that appears, is solvent, and able to pay the amount of said note.

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But if it be true, that Lyman Williams was, at the commencement of this suit, a bankrupt, still, this court, cannot, on that account, now charge the estate of Jesse Williams with the payment of the demand set forth in the orator's bill.

If Lyman Williams had signed the note, as surety for Jesse Williams, and had given him collateral security, and both of them were insolvent, then the orator, if his claim was not barred, might be entitled to the benefit of such collateral security.

In the case of *Homer v. Savings Bank*, 7 Conn. Rep. 484, the court say, that the principle, to be extracted from all the cases on this subject, is this, that when collateral security is given, or property assigned for the better protection or payment of a debt, it shall be made effectual for that purpose, and that, not only to the immediate party to the security, but to others, who are entitled to the debt. And the reason is, that such is the intent of the transaction. "They are trusts," says chancellor Kent, "executed for the better protection of the debt, and a court of Chancery will see that they fulfil their design."

The present case does not come within either the letter or spirit of the principle above stated. In this case there was no collateral security given on the part of Jesse Williams. There is no *trust fund* appropriated for the payment of this demand. But if there were collateral security given, the court could appropriate it to the payment of this debt, only in the event of the insolvency of the estate of Jesse Williams. For if that estate is solvent, and it surely is, then the orator has, or, but for his own neglect, might have had an ample remedy at law.

If Lyman Williams signed the note, as surety for Jesse Williams, he ought to be regarded in equity as an indorser. If so, then, not only is the estate of Jesse Williams discharged from the payment of this debt, but so is Lyman Williams, the indorser. If the orator has, by his own neglect, lost his remedy against the principal, then surely he can have no claim on the surety.

But if Lyman Williams is not discharged from his liability to pay this demand to the orator, still it is contended that there is no rule of law or equity, which would authorise this court to

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decree the payment of this debt to the orator, on the ground that Lyman Williams may, by possibility, hereafter have a claim against the estate of Jesse Williams. Nor can the court, in this suit, undertake to settle the rights between Lyman Williams and the estate of Jesse Williams. The court are not advised how much of the orator's claim belongs to Lyman Williams to pay, nor what claims the estate of Jesse Williams may have against him, which would be a set-off, in case Lyman Williams should pay the whole demand, and assert a claim against the estate on that account.

The opinion of the court was delivered by

REDFIELD, Chancellor. The orator's claim at law, directly against the estate of Jesse Williams, is most undeniably barred. No principle is better established, than that claims *in esse*, not presented to commissioners of insolvency, are barred from being ever after asserted against the insolvent or his estate, within that jurisdiction, whether the creditor resided within the jurisdiction or not. Debts, depending upon a contingency, not happening before the close of the commission, are, of necessity, excepted from the operation of this statutory bar. Indeed, it is necessary for the orator to concede this, as a starting point, in order to get rid of another objection, which he might find formidable: i. e. that he now has a perfect remedy at law.

But the orator claims the interference of this court, on the ground that the surety is still liable, and, being so, might bring his bill to compel payment out of the assets in the hands of the executors, in the first instance.

If the doctrine in the case of *Hunt v. Fay, admr. of Gookin*, 7 Vt. Rep. 170, is to be considered as applicable to this case, and it is difficult to distinguish the cases, then not only is the orator's remedy gone, but his debt also is extinguished. And if the debt of the orator is to be holden so far extinguished, that it could not be any where asserted against the estate of the principal, found in another jurisdiction, it is difficult to perceive how the surety can be held any longer liable.

It is well settled, that if the creditor do any act, by which he is prevented from pursuing the principal, for ever so short a time, the surety is thereby released. In the language of some of the cases, "if he ties up his own hands," he thereby releases the surety. And it must be apparent to every one, that, *a fortiori*, the doing an act, which releases the principal, will release the

surety. And we find no case, when the creditor has, by his own act, even permissively released the principal, where he has been allowed to pursue the surety. It is said this is the case in relation to debts not presented to commissioners and assignees of insolvent and bankrupt estates in England, and it may be so; but I find no case to that effect. If such a rule exists, it is one of policy, and less applicable to the present case, than to the subject, from which it is derived. Policy here would seem to require, that the creditor should not be permitted to pursue a known surety, after he has lain by, and suffered the estate of the principal to be distributed, without presenting his claim. This would be a *practical* fraud upon the surety, by which he ought not to suffer. The creditor is legally affected with notice of the commission, and is, in fact, much more likely to have notice of it, than the surety. He is bound, in good conscience, and in *equity*, to exhaust all remedies against the principal, before resorting to the surety; and in law, even, he is bound not to *re-lease* any of his remedies against the principal, except at the peril of exonerating the surety. And we think it no hardship to require the creditor to present his claim to the commissioners of the the estate of the principal, and obtain whatever the estate may pay.

During the last week, in Chittenden county, a case came before the court, which may be considered as having an important bearing upon the present. As that case will not be reported, elsewhere, I may be permitted, on account of its similarity to the present, to state its details.

It was a bill in Chancery, brought by Joseph Clark, against Roderick D. Hill and Warren Hill, praying to be released from a note, which the defendants held against him, under the following circumstances. The note was signed by the orator, as surety for Bascom and Woodman. Bascom was deceased, and Woodman insolvent. The estate of Bascom being represented insolvent, and commissioners appointed, the creditors refused to present the claim, and by pretending to have mislaid the note, and refusing a tender of the amount due them in bills, prevented the claim being allowed, either in favor of the orator or the defendants. The estate of Bascom proved, in fact, insolvent, the dividend amounting to little more than half the sum due. It was then urged that the surety was not exonerated, and that if he were, the bill was premature, as the defendants might never

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attempt to enforce the note against him. But the court held clearly upon both points for the orator.

1. That such evasion and subterfuge, on the part of the creditors, as had prevented the debt from being allowed by the commissioners, was a substantial fraud upon the orator, by which the creditors had made the debt their own, and, at law, would be prevented from recovering any part of it, although, in equity, still entitled to so much of the debt as would not, in any event, have been obtained from the principals.

2. That the surety was not obliged to lie by and trust the will of the creditors, whether they would attempt to enforce the note against him, or, if they did, risk the continuance of the testimony, necessary for his defence, but might resort to a court of equity, to compel the surrender and discharge of the note; but if he elected this course, he could not enforce the forfeiture and compel the creditor to forego his claim upon the orator, until he paid him the amount really his due, (as is required in the case of a bill brought to discover usury) the orator deducting his costs therefrom. And the court decreed accordingly.

The case now under consideration is not the same with that just referred to. In that case, the creditor refused to present the claim, and took *active* means to prevent its being presented. In this, the creditor merely neglects to present the claim, whereby his debt, as against the estate of the principal, is released or barred. We think sound policy would require, that the surety should be released from his obligation, to the amount which might have been realized out of the estate of the principal, and where there is *actual fraud*, that at law, he should be wholly released.

But if it be conceded, that the orator may still pursue the surety at law, it is evident that his liability is brought in here as a *fulcrum* merely, to enable the orator to reach, indirectly, the estate of Jesse Williams, and thus substantially to avoid the operation of the statutory bar. We should always be ready to march directly up to the object which we would attain, and this is done, in some sense, to avoid circuitry of action. But it was never before heard, that a court of chancery would adopt a *circuitum-gyration* in motion, in order to come at that indirectly, which they otherwise could not reach, and thus virtually repeal a positive statute.

The attempt to compare this, to the case of a surety, who has

a lien upon property, or other collateral security for the debt, is rather *ingenious*, than *ingenuous*, as it seems to us. There is, in some sense, an analogy, but with such specific differences in some particulars, as not to make the one a rule of decision for the other.

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It is a familiar principle of equity jurisprudence, that the creditor may compel the surety to surrender to him any peculiar means, which may have been entrusted to him by the principal, for the purpose of securing the payment of the debt. Hence, he may be compelled to assign a mortgage, upon personal or real property, or any specific lien, given him by the principal, to secure the payment of the debt. And the same is true of any collateral remedy which the surety may hold. And in like manner, the surety may compel the creditor to assign to him, on payment of the debt, any collateral remedy he may have, to secure the payment. And if the creditor parts with these collateral remedies to the prejudice of the surety, and without his consent, the surety is no longer liable. But it was never supposed that the surety could be compelled to stand as a mere stepping stone between the creditor and principal, in order to revive a cause of action, which he had lost by his own neglect. This does not seem to be one of those rights, which the creditor can claim of the surety. This is a right merely *dependent* upon the recovery of the creditor. But those rights, which the creditor has a claim upon, for the purpose of compelling payment of the debt, are all independent, and distinct from the rights of the creditor. The doctrine of subrogation and substitution, between creditor and surety, is familiar and undeniable, but bearing no just analogy to the remedy here sought.

A case might be supposed, in which the cause of action might be barred by the statute of limitations, as to the principal, while the surety might not be able to make the defence available. And if such a case should occur, could it be argued that a bill in chancery would relieve the creditor from the consequences of his own *laches*? The present case is one not very different, in principle, from the one supposed.

The case, relied upon by the counsel for the orator, *Riddle & Co. v. Mandeville & Jamesson*, 2 Peters', Cond. Rep. 268, is not an authority for the present. That there is some analogy between the principle there decided, and the one here contended for, is doubtless true.

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By a statute of the State of Virginia, under which that case arose, the indorser of a promissory note is only liable to his immediate indorsee, and not to a secondary indorsee, as at common law. The policy of such a statute is not very obvious. And the doctrine of the case, referred to, looks, not a little, like an attempt to evade the injustice sometimes unexpectedly following improvident legislation. The court there permitted a remote indorsee to recover of the first endorser, the maker of the note having avoided payment, and the intermediate indorsers being insolvent, on the ground, as is presumed, that each subsequent indorsee looked to the credit of all the previous indorsers, and was, in equity, entitled to their responsibility, which might be ultimately reached through a succession of suits. That was a bill in equity, and decided upon the ground that equity will make the party, ultimately liable, liable in the first instance.

Aside from the consideration, that the doctrine seems to result from the *necessity* of the case, it is observable that the orator had been guilty of no *laches* on his part, from which he sought to be relieved ; that a perfect cause of action did, in fact, exist, against the remote endorser, upon the failure of the maker of the note to make payment, and that the identical money, for which the defendants were liable, was to go into the hands of the orators, through other endorsers, who were mere trustees, for the benefit of the orators. It became, then, strictly, a case for the interference of a court of equity, to substitute the *cestui que trust*, in the place of the trustee. But no right of action, in favor of the surety against the principal exists, until after the payment made by him, which, in this case, was not likely soon to be the fact ; how then could it be said, that the surety holds a remedy in trust for the creditor, when no such remedy exists, or in the common course of events is likely soon to occur ?

What is said of the will in this case, or the law in old cases, making the debts a charge upon the property, will not aid the orator. The debts are a charge upon the property only in a legal mode, and while these debts exist. The debt against the estate, in favor of the orator, was lost, and that in favor of the surety never existed. In either view of the case, we think the bill must be dismissed, and decree accordingly.

GRAND ISLE COUNTY.

JANUARY TERM, 1837.

PRESENT, Hon. STEPHEN ROYCE, }
 " SAMUEL S. PHELPS, } *Assistant Justices.*
 " JACOB COLLAMER, }
 " ISAAC F. REDFIELD, }

SAMUEL BOARDMAN v. GILES HARRINGTON.

In an action before a justice of the peace, on a promissory note, exceeding twenty dollars, but indorsed below ten dollars, the *ad damnum* in plaintiff's writ being ten dollars, and there being no plea in offset, the case is not appealable.

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If, in such case, the defendant first plead in offset, in the County Court, (*or if the plea was not bona fide in the court below,*) it will not make the case appealable.

In an action upon a promissory note, originally above twenty dollars, and indorsed below that sum, but not below ten dollars, it would seem the case is still appealable.

This was an action upon a promissory note for a sum exceeding *twenty dollars*, but so indorsed, as to leave less than *ten dollars* due. The *ad damnum* in the plaintiff's writ was ten dollars. The declaration stated the indorsements on the note, and that less than ten dollars remained due. The justice of the peace, before whom the suit was brought, rendered judgment for the plaintiff. There was no plea in offset, in the justice's court. The defendant appealed, and, in the County Court, the plaintiff moved to dismiss the appeal for want of appellate jurisdiction in that court. The motion was overruled and, on trial before the jury, the verdict passed for defendant. The plaintiff filed exceptions to the decision of the Court overruling the motion to dismiss, as also for other matters. The case was decided

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on the motion to dismiss, and it becomes unnecessary further to consider the plaintiff's other exceptions.

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The opinion of the Court was delivered by

REDFIELD, J.—There was no plea in off-set before the justice of the peace, and such a plea, *first* pleaded in the County Court, or a plea in off-set, not *bona fide*, before the justice, could not give appellate jurisdiction to the County Court.

In the statute of 1821, extending the jurisdiction of a justice of the peace from fifty-three dollars, to one hundred, the first *proviso* to the first section is, "that no appeal shall be allowed in any action brought on notes of hand—if such notes shall not exceed the sum of twenty dollars." If this were the only limitation applicable to the subject, the terms of the statute are such, that the exception of cases, not appealable, would seem to apply to the *notes*, as originally *given*, without reference to the sum remaining due. Hence, it has been held, that promissory notes, exceeding twenty dollars, but indorsed below twenty dollars, and not below ten dollars, were still appealable. But the sum due here, being below ten dollars, it is contended that it came within the 5th Section of that statute.

This section provides, that the judgment of a justice of the peace shall be final *in all cases*, where the *sum demanded* does not *exceed ten dollars*. This, in terms, extends to the case before the court, and we think there is even more propriety in extending it to this, than most other cases. Had the former provision been, that all cases brought on promissory notes, exceeding twenty dollars, should be appealable, it would extend to this case, but it is in the alternative, so that the statute, in order to consist with itself, must receive the construction now given it.

Judgment of the County Court reversed, and judgment that the cause be dismissed.

Hector Adams, for plaintiff.

Defendant, pro se.

ADDISON COUNTY.

JANUARY TERM, 1837.

PRESENT, HON CHARLES K. WILLIAMS, *Chief Justice*.
 " STEPHEN ROYCE,
 " SAMUEL S. PHELPS, } *Assistant Justices*.
 " ISAAC F. REDFIELD, }

RODMAN CHAPMAN v. TIMOTHY C. SMITH, Trustee of JAMES
 H. HOYT. Addison,
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1837.

A mortgagee in possession, having obtained a decree of foreclosure, is not accountable, at law, to the mortgagor, for the rents and profits of the mortgaged premises, after such decree.

Nor is he accountable for the rents and profits before such decree, unless they were allowed by the master on taking the account.

The only remedy of the mortgagor, in such a case, is in equity.

Quere. Whether he has any remedy, except by a bill of review brought on the decree.

This was a trustee action. Judgment was rendered by the county court that Smith was trustee of Hoyt. The facts in the case sufficiently appear in the opinion of the court.

C. Linsley and Starr & Bushnell, for Trustee.

E. D. Woodbridge and P. C. Tucker, for plaintiff.

The opinion of the court was delivered by

WILLIAMS, Ch. J. We are called on to decide, in this case, whether, from the disclosure of Smith, he is to be adjudged trustee of Hoyt, or whether, in the language of the statute, he has in his possession any money, goods, chattels, rights or credits of said Hoyt. It appears from the disclosure, that the principal debtor mortgaged a house and lot in New Haven to Smith, to secure the payment of the sum of five hundred dollars, on

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the 20th Sept. 1832, and, in lieu of the interest on the sum above named, put him in possession under a lease. Smith continued in possession of the premises mortgaged, from the time of the expiration of the lease, in September, 1832, to the 24th December, 1833 ; having, in the mean time, to wit, in January, 1833, procured a decree of foreclosure on his mortgage. In taking the account of the amount due on the mortgage, the interest on the sum due was included from September, 1832, and no account was taken of the rents and profits from the time of the expiration of the lease. The amount specified in the decree, including the interest, was paid, in pursuance of the decree, of foreclosure, in February, 1834. So that, in point of fact, Smith has occupied the premises from the 20th September, 1832, to December, 1833, without paying any rent therefor. There appears, therefore, an apparent equity in considering him as the debtor of Hoyt, for the value of those rents. This equity, however, if there is any such, cannot be inquired into in this action. If there is any remedy for Hoyt, it must be either by a bill of review, to correct the error in the report of the master, on which the decree was founded, or by some other process in equity, to compel Smith to account for the rents and profits. The decree is conclusive as to the amount due on the mortgage, which, of course, settles all questions as to the rents received by him before that time. Whether there is any such remedy in equity, is not in question before us in this case. From and after the expiration of the lease, Smith was in possession of the premises, as mortgagee, after condition broken, and, as such, entitled to the possession and the accruing profits. The estate of Hoyt, the mortgagor, was gone at law, and he had only an equity of redemption. He could maintain no action at law, against Smith, to recover the rents. No precedents are found for any such action, nor are any intimations any where given, that any such action could be maintained. On the contrary, it is very apparent that his only remedy was to pay the debt, and to be reinstated in his title, and if he intended that the mortgagee should be accountable for the rents and profits, to compel him in equity to account therefor.

As we consider that Smith was lawfully in possession of the mortgaged premises ; that he was accountable for the rents and profits in equity ; that the account, between him and the mortgagor of the amount due on the mortgage, having been once ta

ken by the master and accepted by the court of Chancery, was conclusive between Smith and Hoyt, up to the time of making the decree. And, as Hoyt failed to pay the amount of the decree immediately, but permitted Smith to remain in possession, Smith cannot now be considered as indebted to Hoyt, or as having any rights or credits of Hoyt, liable to be taken by the creditors of Hoyt, in this action. If Smith has received any thing further than he was equitably entitled to receive, it has been by the permission and voluntary act of Hoyt, or those claiming under him. The case of *Gould v. Tancred*, 2 Atk. 534, is an authority against the views entertained by the counsel for the plaintiff. The judgment of the county court must, therefore, be reversed, and judgment entered that Smith is not the trustee of Hoyt.

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PLINY SABIN v. BENJAMIN STICKNEY.

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Under the statutes of the State of New York, on a sale of mortgage premises at public auction, the mortgagee may become a purchaser, and is accountable for only the sum bid, and may proceed at law on his bond for the balance.

It does not afford evidence of collusion or fraud, that he has sold the premises at an advanced price; that the persons to whom he sold were present at the public sale and did not bid, unless they were prevented from bidding by the procurement of the mortgagee.

This was an action of debt on a bond, conditioned for the payment, by the defendant to the plaintiff, of the sum of six hundred dollars.

The defendant pleaded, specially, in bar of the plaintiff's action, that the sum of six hundred dollars, mentioned in the condition of said bond, was the purchase money agreed by the defendant to be paid to the plaintiff for a house-lot, with a house and wagon-shop thereon—situated in the town of Cazenovia, in the county of Madison, and State of New York, which the plaintiff had conveyed to the defendant, and that, to secure the payment of said sum of six hundred dollars, in the manner, and at the times, specified in the condition of said bond, the defendant, on the 15th day of October, A. D. 1825, executed and

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delivered to the plaintiff a mortgage deed of the same premises, which the plaintiff had conveyed to defendant, and that, on the same 15th day of October, A. D. 1825, the defendant paid to the plaintiff one hundred dollars, in part of said sum of \$600, named in the condition of said bond—that the plaintiff retained possession of said wagon-shop, and the defendant went into possession of said house and the remaining part of said lot—that, afterwards, to wit, on the first day of March, 1826, the plaintiff put the defendant out, and took possession of the whole of said premises, and ever after retained possession of the same, until the 20th day of April, A. D. 1827, when said mortgaged premises were disposed of and sold for the benefit of the plaintiff, and by his direction, to Allen Dyer and Calvin B. Stowell, for the sum of five hundred dollars. And the defendant says, that, at the time the plaintiff took possession of said premises, and at the time the same were sold on the said 20th day of April, 1827, they were well worth in money six hundred dollars, which sum is much greater than the amount then due on said mortgage—and that the plaintiff, in fact, received, in the use and occupation of said mortgaged premises, previous to the sale of the same, on the 20th day of April, A. D. 1827, and by the proceeds of the sale of the same, at that time, to the said Dyer and Stowel, the whole amount, remaining due, of said six hundred dollars, mentioned in the condition of said bond, and the same, by the proceeds of said sale of said premises, and by the said use and occupation thereof, was fully paid and satisfied to the plaintiff.

The plaintiff, protesting that he did not, on the first day of March, A. D. 1826, or at any other time, put the said defendant out of possession of the said mortgaged premises, or take possession thereof, until after the defendant had voluntarily relinquished the possession of the said premises, replied, that the rents and profits of the said premises, during the time they were occupied by the plaintiff, as stated in the defendant's plea, did not exceed the sum of sixty dollars, which sum he is ready to apply on said bond. And that the said mortgage deed from the defendant to the plaintiff, to secure the payment of the sums of money, specified in the condition of said bond, contained a power for the sale by the plaintiff, of the said premises, therein described, in default of payment of the said sums of money specified in the condition of said bond or either of them, and that the said

mortgage deed, together with the said power of sale, had been duly recorded in the office of the County Clerk of the said County of Madison, and that the defendant, having made default in the payment of the said sums of money in the said condition of the said bond specified the plaintiff, afterwards, pursuant to the said power of sale contained in said mortgage, and pursuant to a notice of said sale, which had been published, weekly, for the term of six months, next previous to the said sale, in a newspaper published in the county of Madison, in which the said mortgaged premises are situated, did, on the 20th day of April, A. D. 1827, sell, at public auction, the said mortgaged premises, to one Lemuel White, he being the highest bidder for the same, for the sum of two hundred dollars, which said sale, so made as aforesaid, was a fair, open and public sale, and was made conformably to the laws of the State of New York, and, after deducting the costs of foreclosure, and sale as aforesaid, left the sum of one hundred and sixty-nine dollars, to be applied on the said bond of the defendant, which sum, and, also, the said sum of one hundred dollars, paid by the defendant to the plaintiff, at the date of the said bond and mortgage, as stated in the defendant's plea, are endorsed on the said bond; that the defendant and plaintiff, at the time of the execution of the said bond and mortgage, by the defendant, as aforesaid, were citizens of the State of New York, where the said bond and mortgage were executed, and where the said mortgaged premises are situated. And that, by the laws of the State of New York, the nett proceeds of the sale of the said mortgaged premises, so made, as aforesaid, and no more, were to be applied in payment of the said bond of the defendant; without this, that the mortgaged premises were disposed of and sold to the said Dyer and Stowel, for the sum of five hundred dollars, for the benefit of the plaintiff, and by his direction, on the 20th day of April, A. D. 1827, as is stated in the defendant's plea, or at any time previous to that date.

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The defendant rejoined, that the sale, mentioned in plaintiff's replication, was not made fairly and with good faith, but collusively and fraudulently, for that the premises were in fact sold to one Allen Dyer and Calvin B. Stowel, for the sum of five hundred dollars, which was paid by said Dyer and Stowel for said premises, of which sum four hundred and eighty dollars was paid to and received by the plaintiff, as the proceeds of the sale

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of said premises—that, for the fraudulent purpose of having the premises bid in at said public sale, at a small sum, and to enable the bidder to pass the title of the premises to the said Dyer & Stowel, it was agreed by and between the plaintiff and one Lemuel White, previous to said public sale, that said White should, at said public sale, bid in said premises, and that the plaintiff should receive, instead of the sum said premises should be bid off for, the sum, that said premises should sell for, at private sale, and that, in compliance with said agreement, the said White, at said public sale, on said 20th day of April, did bid off said premises, at the sum of two hundred dollars, and on the 23d day of the same April, passed the title to said premises to the said Dyer and Stowel, and received from them, for the same, five hundred dollars, of which he paid to the plaintiff four hundred and eighty dollars, as the proceeds of said sale, and the defendant avers that the plaintiff, if he had been disposed so to do, might, at said public sale, have had the premises sold to and bid off by the said Dyer and Stowel at the same sum, that was paid for the premises by them at private sale, and that the plaintiff, at the time he made said agreement with said White, well knew that said premises could be sold, at any day, at or near the price, that was paid by the said Dyer & Stowel; and that the proceeding of the said Sabin, in procuring the said White to bid off said premises, at two hundred dollars, was unfair and done in bad faith, for the purpose of enabling the plaintiff to apply on said bond the sum of two hundred dollars, only, instead of four hundred and eighty dollars, which he, in fact, received, as the proceeds of the sale of said premises—and that the plaintiff had the possession of the whole of said premises, from the first day of March, A. D. 1826, to the 23d of April, A. D. 1827, and of the wagon-shop, from the time of the sale to the defendant—and that the use and occupation of said premises, were during that time, of the value of one hundred dollars—and that the plaintiff, by the use and occupation of said mortgaged premises, and by the payment of the proceeds of the said sale, of said premises did, in fact, receive the full amount due on said bond.

The plaintiff sur-rejoined, that the said sale of the premises to the said Lemuel White, was made fairly and in good faith, at public auction, and conformably to the laws of the State of New York, nor could said premises be sold at said vendue for

more than the said sum of two hundred dollars, and, that, although true it was that the said mortgaged premises were bid off at said vendue by the said White, for the benefit of the plaintiff, yet that by a certain statute law of the State of New York, entitled "an act concerning mortgages," which was in full force, before, and at the of the time said sale of the said mortgaged premises to the said White, it is provided "that no title to mortgaged premises, derived from any sale, made in virtue of a special power, for that purpose in the mortgage contained, shall be questioned, impeached or defeated, either at law or in equity, by reason that the mortgaged premises were purchased in by the mortgagee, or his or her assignee, or by his her or their representatives, or for his her or their benefit or account, provided always, that the sale was, in every other respect, regular, fair, and with good faith," and that the nett proceeds of said sale to said White, together with all payments, made by the defendant to the plaintiff, including the rents and profits of said premises, during the time they were occupied by the plaintiff, as stated in the defendant's plea and rejoinder, do not exceed the sum of three hundred and thirty dollars, and that the balance of said debt is due and unsatisfied to the plaintiff.

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To the plaintiff's sur-rejoinder the defendant answered, admitting the existence of the statute of the State of New York, as set forth in the plaintiff's sur-rejoinder, and re-affirming the matters set forth in the rejoinder, and tendered issue to the country, in which the plaintiff joined.

On the trial before a jury, in the county court, the defendant introduced depositions of witnesses, tending to prove that the mortgaged premises were worth much more than the sum for which they were sold, under the power contained in the mortgage, and that White bid off the premises, under an agreement with plaintiff, that he (White,) would sell them at private sale, and account to plaintiff for what they should sell for, and that he sold them for \$500. Other depositions were read, stating that the public sale, upon the mortgage, was fairly conducted, and that several persons made bids.

Upon this state of the evidence, the court directed the jury, that, by the statute of New York, which was read in the case, it was competent for the plaintiff to become the purchaser of the mortgaged premises, at the public sale, either in his own name or through another, and that *that* circumstance did not vi-

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tiate the sale or subject the plaintiff to account for the avails of the ultimate sale of the property, provided the sale at auction was without collusion and *bona fide*; that the circumstance that those, who purchased the estate of the plaintiff, at private sale, were present at the auction, and did not bid, did not, standing by itself, and unconnected with proof that their not bidding was by the procurement of the plaintiff, legally tend to shew the sale collusive; and that, although the inadequacy of price had a tendency to establish collusion, yet they would not be justified in finding the sale collusive on that ground alone, and that there was nothing else in proof, which had a legal tendency to shew collusion. Upon this decision a verdict was taken for the plaintiff, the value of the rents or use of the property being agreed on by the parties, and applied in payment on the bond. The case came up to this court, on exceptions by defendant.

H. Seymour, for defendant.

In the State of New York, the law on this subject is, that if the mortgagee sells the mortgaged premises, in pursuance of a power for that purpose, and sufficient, is not produced to pay the debt, an action lies for the balance. If the amount is raised, the debt is paid, and if there be a surplus, it belongs to the mortgagor. If the mortgagee simply re-enters, but does not sell, and the property is of sufficient value to satisfy the debt, the debt is paid. *Spencer v. Harford*, 4 Wend. 384. *Morgan v. Plumb*, 9 do. 292. *Case v. Boughton*, 11 do. 109. *Lansing v. Golet*, 9 Cowan. 346.

It appears that on the first of March, 1826, about four and a half months after the purchase, defendant abandoned the premises and plaintiff, at the same time re-entered upon, and appropriated them to his own use. It does not appear that defendant ever after made any claim to the premises, or that he was ever again in the State of New York. The value of the property at that time was \$600, and the sum due on the mortgage but \$500 and interest four and a half months. The plaintiff had then received one hundred dollars of the purchase money, and had re-possessioned himself of the property he had sold, and he could take what further steps he pleased, only for the purpose of extinguishing the equity of redemption. But it would seem that, in justice, all further pecuniary claim on the defendant was extinguished. And the law of the State of New York is so that the re-entering of the plaintiff, and appropriating the mortgaged premises to his own use, was a satisfaction and payment of the debt.

Plaintiff could not, by any act of his, revive the debt or any part of it, and the subsequent sale at public vendue, in April, 1827, was of no use and could have no effect on the rights of the parties, other than to cut off the equity of redemption, and the court should have so instructed the jury.

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If plaintiff's debt could be considered a subsisting claim, after March, 1826, defendant then insists, that the sale of said premises in April, 1827, produced the sum of \$480, and that plaintiff actually received the sum of \$480, as the proceeds of said sale, which he should have applied as payment on said debt. The sum of \$200, at which the property was bid in by the plaintiff's agent, (White,) at the vendue sale, was not the sum, which the plaintiff received and realized from the sale of this property.

It is the duty of the mortgagee to sell for the best price. If the facts in this case show that plaintiff did not do this at the vendue sale, the sum, at which the property was bid in, ought not to be taken as the standard or measure of its value, nor the sum for which plaintiff should account. 18 Johns. 110. 9 Cowen, 402, 384. 2 Gallison, 155. The sale to Dyer & Stowell, two days after the vendue sale, was, in fact, the sale, by which plaintiff converted the mortgaged premises into money, and furnishes the best evidence of the value of the property.

The sum, at which the property was bid off, is not to be taken as the sum, for which the mortgagee is to account, only so far as it may afford the best evidence of the true value of the property. There is no positive law making the sum bid, the sum for which the mortgagee shall account.

The act, recited in the pleadings, provides only that the title shall not be questioned, &c. by reason of the mortgagee, or his agent being the purchaser. The sum, for which the mortgagee shall account, is left to be governed by the principles applicable to sales by administrators, guardians, and other trustees. 4 Kent Com. 167. 4 Johns. Ch. Rep. 305. 4 Wend. 674. Mad. 110. The title may pass by the sale, and yet the mortgagee be holden to account for a larger sum than that, which the property was bid off at. 5 Johns. Ch. Rep. 444. 10 Johns. Rep. 197. 14 do. 442.

In this case inadequacy of price is not alone relied on. Connected with it is the fact, that Dyar & Stowell were present at the vendue and did not bid, and that, within two days after, they

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paid \$500 for the same property, and the fact that the plaintiff, whose duty it was to make the most of the property, for the benefit of the defendant, received to his own use the \$480, produced by the sale of the property to Dyer & Stowell.

These facts are inconsistent with any other supposition, than that the plaintiff contrived to have the property bid in at the vendue for a small sum, or that, by a culpable omission of duty, he permitted it. The court should have instructed the jury, that these facts tended to prove fraud in the plaintiff, or such unfairness and want of good faith in his proceedings, as would justify them in finding that the sale of the mortgaged premises produced to the plaintiff \$480 in payment of his debt.

Starr & Bushnell, and C. Linsley, for plaintiff.

I. Fraud or collusion, when alleged to avoid or invalidate any transaction, must be proved by showing some collusive or fraudulent acts of the party, and are not to be inferred from mere casual or negative facts. The acts or words of a third person, or an alleged *particeps criminis*, cannot be admitted in evidence until a privity between him and the party be shown. *Windsor et al. v. Robbins*, 2 Tyler, 4. *Spencer v. Harford*, 4 Wend. 384. *Case v. Boughton*, 11 do. 106. *Morgan v. Plumb*, 9 do. 292. *Jackson v. Henry*, 10 Johns. Rep. 185. *Bergen et al. v. Bennet*, Caines' Cas. 1. 4 Kent's Com. 146, 148, 190, and 191. *Jackson v. Crafts*, 18 Johns. Rep. 112.

II. Mere inadequacy of price, on a sale of property at auction, is not, by itself, a fact, from which fraud or collusion can be inferred, even in the case of the sale of personal property of small amount, and, more especially, it is not, in the case of the sale of real estate of considerable value.

III. Nor is the fact, that persons, who were present at the auction, contracted some days after, for the purchase of the same property, at a higher price, a ground to infer fraud or collusion in the auction sale. The terms of payment, on which the purchase was made by those persons, are not stated in the depositions. The purchase might have been made on an extended credit.

Supposing the charge of the Judge upon the evidence to have been erroneous, the court will not grant a new trial, unless the evidence be such, as, with a correct charge, will probably turn the verdict the other way. See *Goodrich v. Walker*, 1 Johns. Cas. 250.

The law of the State of New York is to govern the case, the

parties being citizens of that State, when the contract was made, and it being there to be executed. *Prentis et al. v. Sawyer*, 13 Mass. Rep. 23. *Blanchard v. Russel*, do. 4. *Blake v. Wheaton*, 5 do. 509. *Grimshaw v. Bender et al.* 6 do. 157. *Winthrop v. Carleton, jr.* 12 do. 4. *Barrell v. Benjamin*, 15 do. 354. *Pearsall v. Dwight*, 2 do. 84.

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The opinion of the Court was delivered by

WILLIAMS, Chief J.—The pleadings have extended to a very unnecessary length; so much so, as to almost smother the controversy. The whole question, in issue, might have been presented on a plea of payment. The controversy between the parties is, whether the bond in suit was paid and satisfied, by the proceedings on the mortgage, had in the State of New York; and to this end, the defendant now contends, that, when the plaintiff entered into possession of the premises, mortgaged as collateral security for the bond in suit, the bond itself was paid, if the premises were of sufficient value; or that the jury would have been warranted in finding the sale of the mortgaged premises, a sale for five hundred dollars, and the plaintiff must be considered as having received that sum on the bond.

On the first position assumed by the defendant, it is sufficient to remark, that it is contrary to the whole law on the subject of mortgages. The mortgagee may enter in possession of the mortgaged premises, and continue in possession until his debt is satisfied. The authorities, which have been read, do not countenance the idea, that the law is any different in the State of New York, or that a mere taking possession of mortgaged premises, without foreclosure, subjects the mortgagee to account for the value.

On the second position assumed, it becomes necessary to consider the effect of a sale of mortgaged premises, under the statute of the State of New York, where the mortgagee becomes the purchaser. The statute must intend something more than has been attributed to it, in the argument; i. e. merely to enable the mortgagee to pass the title, freed from the equity of redemption. It cannot be that, as between the parties, a sale under the statute is to be treated as a strict foreclosure. The creditor cannot be held accountable for the value of the premises, when he sells under a power of sale, whether the value is realized or not. If the creditor is accountable for any thing more than the amount of the sale, even when he becomes a purchaser,

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it must be on the ground, that he is to be treated as a trustee for the mortgagor. There is, however, but very little similarity between the character of a trustee and mortgagee. The mortgagee, contrary to the general rule, holds in trust for himself until the debt is discharged; but, after that, he may be said to be trustee for the mortgagor. Whether, without the provisions of the statute of the State of New York, the mortgagee, who sold under a power of sale, could become a purchaser, without being held accountable for the value, or be subject to have the premises re-sold, may be questionable. From the case of *Webb v. Roche*, 2 Sch. & Lefr. 673, it was laid down in the first edition of *Mad. Chancery* 91, that the rule, which prohibited a trustee from becoming a purchaser of a part, or the whole of the estate, of which he was trustee, was not applied as between mortgagors and mortgagees. But in the second edition, from the same case, as also from the case of *Gubbins v. Creed*, 218, of the same book, it was considered that it did apply. It is, however, certain that, under a decree of sale, as a sale in bankruptcy, the mortgagee may, under an order from the chancellor, obtain leave to bid at the sale and hold the mortgagor accountable for the sum not raised by the sale. *Ex parte Marsh*, 1 Madd. Rep. 148.

It appears to us that such must be the effect of a sale, under that part of the statute of the State of New York, which authorises the mortgagee to become a purchaser, and declares that the sale shall not be questioned in law or equity, on account of his being a purchaser. The interest of both the mortgagee and mortgagor are sufficiently protected, by requiring that public notice shall be given of the sale. Both of the parties may be present, and use all lawful endeavors to enhance the price. As to the extent of the debt, at least, both are interested that the sale should raise that amount.

We are fully satisfied, therefore, with the directions given by the County Court;—that the sale was not vitiated in consequence of the plaintiff being a purchaser, either in his own name or through another; nor was the plaintiff subject to account for the avails of the subsequent sale, provided the sale at auction was without collusion and *bona fide*. It would result from this, that the other part of the direction was also correct, viz. “that the circumstance, that those, who purchased the estate of the plaintiff at private sale, were present and did not

"bid, did not tend to show the sale collusive, unless they were prevented from bidding by the procurement of the plaintiff."

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From an examination of the depositions, we can find nothing tending to shew the sale collusive, or that the plaintiff was guilty of any fraud, or used any endeavors to prevent either the defendant or any one else from bidding at the sale. According to the opinion above expressed, he might become a purchaser, and, having purchased, was at liberty to dispose of the property, in such manner, or for such prices as he thought proper. In the absence of any fraud, he cannot be charged with any greater sum than was bid at the auction.

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The direction, therefore, that there was nothing in proof, which had a legal or legitimate tendency to shew collusion, was strictly correct. The judgment must, therefore, be affirmed.

RUTLAND COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.
 " STEPHEN ROYCE, }
 " SAMUEL S. PHELPS, } *Assistant Justices*.
 " JACOB COLLAMER, }
 " ISAAC F. REDFIELD, }

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WILLIAM P. GRAHAM v. BILLY TODD.

That a writ, returnable to the County Court, is signed by a justice of the peace, who is interested in the event of the suit, is no ground of abatement.

This was an action commenced to Rutland County Court. The writ of attachment was signed by Jonas Clark, justice of the peace for the county of Rutland. At the first term, the defendant filed a plea in abatement, alleging that said Clark was the real owner of the debt declared on, and so, interested in the event of the suit, at the time of signing said writ. To this there was a demurrer. The County Court overruled said plea, and awarded a *respondeas ouster*. To which decision the defendant excepted. After final judgment in said suit, for the plaintiff, the case passed to the Supreme Court.

Harris & Harmon, for the defendant.

It is contended that a justice of the peace has no authority to take security, by way of recognizance, for the prosecution of a suit, if he be interested in the demand, which he seeks to recover, nor can he "teste" his own writ—the proceeding is *coram non judice*, and the recognizance void. *Kellogg, Ex parte*, 6 Vt. Rep. 509. 1 Blac. Com. 91.

There is a doctrine in point in the case of *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. R. 321. It is there laid down that the true principle seems to be this, where the judge himself is interested, he is, in general, certainly incompetent to act as such.

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At common law, magistrates have no authority to take a recognizance. Their power, in such case, is derived solely from the statute. *Hiecock v. Hiecock*, 1 Chip. Rep. 133. Magistrates can take nothing by implication. They are confined strictly to the authority given them. Sir Edward Coke, as well as Blackstone, observes, that particular jurisdictions, derogating from the general jurisdictions of the courts of common law, are ever taken strictly and cannot be extended further than the *express* letter of their privileges will warrant.

The case of *Bates v. the Administrators of Barber*, 2 Chip. R. 96, is in point. It there is decided that a justice of the peace has no authority to render judgment by confession, if he be interested in the demand, on which the judgment is rendered, because a debt of record is created—and a recognizance is defined to be an obligation of record, which a man enters into, before some court of record, or magistrate duly authorized. 2 Blac. Com. 341.

We contend that the taking of a recognizance is within the statute, which prohibits a justice from taking cognizance of any cause, where he is directly or indirectly interested in the cause or matter to be determined. Stat. of Vt. 131 Sec. 23.

The statute, p. 71 Section 44, provides that sufficient security shall be given to the defendant, &c. before issuing the writ, &c. The matter to be determined is, whether the security offered by the plaintiff is sufficient, of which he must take judicial cognizance, and must decide to his own satisfaction, and with disinterested discretion and judgment. This provision is positive and peremptory.

But when the justice is the legal party to the suit, and offers and accepts security for the defendant, he would most probably be satisfied, by returning to the court the nominal pledge of John Doe, and thus evade the statute.

The magistrate is the sole judge of the sufficiency of the security he takes, and his "*minute*" itself, is plenary proof and conclusive upon both the recognizor and recognizee. *Peck v. Smith*, 3 Vt. Rep. 265.

He should, in all cases, be divested of interest and bias, in

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the exercise of his judicial power. It was observed by the court in the State of New York, in a case, where the justice was related to a party to the suit, that the impropriety and gross indecency of an exercise of his judicial power in the case, is alone sufficient to disqualify him to act as such.

It is said that the Clerk of our court may sign his own writs, &c. If this position be correct, it is because he is the constituted organ of the court, and acts under the eye of a court of record—but to grant this extraordinary power to about 2300 magistrates, seems to us to be unnecessary, impolitic, and would tend to corrupt the purity of justice.

J. Clark, for the plaintiff.

1. By the statute, every writ or process, returnable to the County Court, must be signed by a judge or clerk of the same court, or by a justice of the peace of the same county. The same powers are given to a justice, in this respect, within his county, as are given to a judge or clerk of the county court.

And as to this, there are no exceptions, either as to interest in the magistrate, or relationship by affinity, or consanguinity, to either party. It is a mere ministerial act, to bring the defendant into court, to have the cause tried—not by him, who signed the writ—but by a disinterested tribunal.

2. A judge or clerk of the County Court may sign officially his own writ, returnable to the County Court. The clerk may make up the record of a judgment in his own favor, issue and sign the execution, and, if extended on real estate, record the same and the officer's return. It is a common practice for an attorney, who is a justice, to sign County Court writs, by him issued, and to take a recognizance for costs, and, at the same time, to agree to indemnify the person recognized. This would make the magistrate interested in the event of the suit, but no one ever supposed it would abate the process.

3. But a remote interest in the magistrate is no legal objection to his even trying the cause. *State v. Bachelder*, 6 Vt. Rep. 479, and the cases there cited.

4. A judge may issue an execution in certain cases. Statute, p. 110.

The opinion of the Court was delivered by

COLLAMER, J.—The statute provides, “that the ordinary mode of process, in civil causes, in the several county courts, and supreme court of judicature, within this State, shall be

"by writ of summons or attachment, and according to the form prescribed by law. And every such writ or other process, returnable to any county court, within this State, shall be signed by a judge or clerk of the county court, in which the cause is to be tried, or a justice of the peace of the same county. To this provision there are no *express* exceptions whatever.

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It is, however, insisted that a justice, who is in interest, cannot sign the writ, because the act defining the power of justices, in the 23d Section, provides that no one, "who shall be directly or indirectly interested"—"shall take cognizance of any cause." Most obviously, however, the issuing of process, returnable to another court, is not *taking cognizance of the cause*. That statute relates entirely to trying causes and rendering judgments, including confession judgments.

It is next insisted that this statute, which permits any justice of the county to sign the writ, must be taken with exceptions, though none are expressed, of which the present should be one, because the signing of a writ of attachment includes taking a recognizance to the defendant to secure costs, which is a *judicial act*, and which one cannot exercise in his own behalf. He undoubtedly may do it by express law. If the writ were a summons, originally, no recognizance was necessary, and the statute expressly gives the same power to sign an attachment as a summons. And when the law *recently* provided for a recognizance in the case of summons, it did not change the power of signature. If the signing justice were interested with the defendant, he could never have an interest to enter an improper or fictitious recognizance. If interested with the plaintiff, he would be bound to contribute to the defendant's costs, and to indemnify the bail. The legislature could, therefore, grant the exercise of this power to such a justice without hazard of abuse.

The principal argument, addressed to us, is based on the *effects and consequences*. It is insisted, that to permit the justice to sign an attachment, and take a recognizance, where he is in interest, would enable him, and that he would be interested to do so, to enter such recognizance *falsely*. This can hardly be supposed, as already shown. But in considering *consequences*, let us consider some of the effects, and consequences, and practical inconveniences of adopting the exception insisted on by the defendant. Pleas in abatement would be filed, and trials thereon

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would be had for many supposed interests, which the signing magistrate might be supposed to have. For *any pecuniary* interest, however remote, would be fatal. It would prevent the clerk from signing his own writs; for his taking a recognizance, in such case, is not the act of the court. By the present law, a justice may sign a writ, returnable to the county court, to be served in any county in the State. Blank signatures may be, and are, extensively used, and the plaintiffs and their attorneys cannot know all the possible interests in relation to the demand, which the justices may have contracted, and if the signing magistrate's or clerk's blank signature happened to be used, when they had some such covert interest, or were members of the town, bank, or other corporation, which was a party, a *plea in abatement* could and would be interposed. When consequences, so inconvenient on the one side, are met by little or none on the other, we should be slow to adopt the exception claimed by the defendant.

It is a general rule of construction, that where exceptions are *expressed* in a statute, none others can be *implied*. It is observable, that in many cases, where power is granted to justices by our statute, it is expressly forbidden to be exercised by those in interest; as in trial of cases; also, where another justice is called to continue a cause in the absence of a sitting justice; also, in the case of appointing appraisers of land on execution. In this case of signing writs, the legislature has expressed no such exceptions, nor is the court convinced they *intended* so to do, nor do we feel either authorized or inclined to engraft such an exception upon the statute.

Judgment Affirmed.

ROSSELL BARBER v. TOWN of BENSON.

Rutland,
January,
1837.

An action against a town for the neglect of the constable, in not levying, collecting, and returning an execution, cannot be sustained by proof of his having actually collected the execution, but neglected to pay the money to the creditor.

No such action can be sustained against the officer, or the town, if it appear that there was, in fact, no such judgment, as that described in the execution.

This was an action against the town of Benson, for the neglect of its constable, in his official duty. The declaration alleged, that the plaintiff recovered a judgment, before a justice, on the 13th day of June, 1834, and on the 14th took out execution thereon, of that date, and delivered it to the constable, to levy, collect, and return, but that he wholly neglected either to levy, collect, or return the same, and it remains wholly unpaid to the plaintiff. Plea, the general issue. On the trial, the plaintiff offered evidence, tending to prove, that the constable actually collected the money on the execution. This was objected to by the defendant, and was rejected by the court. It appeared that the judgment was rendered on the 13th day of June, but in the execution, by a clerical error, it was recited as a judgment, rendered on the 14th day of June. Whereupon, the court decided that the plaintiff could not recover, and judgment was rendered for the defendant. To which decision the plaintiff excepted, and the cause passed to the Supreme Court.

P. Smith, for plaintiff.

Although the constable might not have been liable to the plaintiff, for not collecting an execution, which mis-described or mis-recited the judgment, on which it issued, yet, if he collected the execution, he must be deemed to have done so in virtue of his office, and to have held the money of the plaintiff in that character.

If so, the statute, in terms, makes the town liable for his neglect to pay it over, on demand, to the plaintiff. Stat. 420.

The constable, after collecting the money on the execution, could not be compelled to repay it to the execution debtor, as his execution would justify him without showing the judgment. 3 Lev. 84, 85. Watson on sheriffs, cited in 2 Saunders, Pl. & Ev. 792.

But the plaintiff further insists, that the town would be liable for the neglect of the constable to collect the execution, because it was not his province to inspect the record of the judg-

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ment, or decide upon the effect of the irregularity mentioned in this case.

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J. Kellogg, for the defendant.

1. The evidence, offered by the plaintiff, was properly rejected by the court; no evidence having been offered by the plaintiff of the existence of such a judgment, as that recited in the execution, which had been placed in the hands of the constable for collection.

2. If the judgment recited in an execution, as the judgment on which it issued, purport to have been rendered at one term, or on a particular day, and the record produced to support said execution, be a judgment entered up at another term, or on a different day, such execution is irregular, and all the proceedings, had under it, are void. *Rider v. Alexander*, 1 D. Chip. Rep. 267. *Culter v. Wadsworth*, 7 Conn. Rep. 6. *Espinasse's N. P.* 744.

To render a constable liable to an execution creditor, for not collecting and paying over the amount of an execution, it must appear that the execution has a judgment to support it. If the execution be irregular, the officer, to whom it was delivered, cannot be made liable for not executing it, and, consequently, the town, appointing such constable, cannot be held liable for such neglect of their constable.

4. The allegation in plaintiff's declaration is for the neglect of the constable, in not collecting and paying over the execution, and not that the defendant had collected the money, and refused to pay it over.

5. If the constable had collected the money on a void execution, he was under no obligation to pay it to the plaintiff, but was liable to pay it back to the person, of whom he collected it.

The opinion of the court was delivered by

COLLAMER, J.—This action cannot be sustained against the town, unless an action could be sustained against the constable, for the same official act or neglect alleged. The plaintiff claims to recover the damages he has suffered from the constable having neglected to levy, collect and return a certain execution. The court below correctly declined receiving from the plaintiff testimony, tending, not to support, but to falsify his declaration, showing that the constable did actually levy and collect the execution, but was guilty of another neglect, not declared on.

It appeared on the trial, that the execution, delivered to the

constable, described a judgment rendered on the 14th day of June, 1884, when, in fact, no judgment was rendered on that day. A judgment of June 13th no more sustains or justifies the execution, than a judgment of another year, or sum; as the creditor might immediately, or at any time, take out and enforce a correct execution on that. This cause is, then, to be treated in the same manner, as if this execution had issued without a judgment.

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1887.

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In an action against an officer, and, of course, in an action against the town, for his neglect, the plaintiff must allege and prove the judgment, and the issuing of the execution upon that judgment. The execution is no evidence of the judgment, except between the parties thereto, and, of course, is not conclusive, when produced. This was settled in *Ackworth v. Kemp*, Doug. 40. In this case, the plaintiff was bound to prove both these allegations, and the defendant was at liberty to disprove either of them. As they were not true, the plaintiff could not recover.

This was an execution issuing from an officer, having competent authority and jurisdiction to issue such precepts, and, being good on the face of it, would have been sufficient to justify the officer in executing it, but it would have been trespass in the plaintiff. It was an execution without a judgment, and would have been no justification to the plaintiff. The question, then, is this; as this precept would have protected the officer, was he bound to execute it?

Had the debtor been committed to jail, and a jail bond been taken, it could not have been enforced. *Sherwin & Vaughan, v. Bliss*, 4 Vt. Rep. 96. *Stillman, Wells & Co. v. Barney*, 4 Vt. Rep. 187.

Had the property of the debtor been taken in execution, it would have been trespass in the plaintiff. The plaintiff ought not to complain that the officer neglected to render the plaintiff a trespasser, nor can he say he has been injured by such neglect. This same question was decided in this court in *Hill v. Wait*, 5 Vt. Rep. 124.

Judgment Affirmed.

Butland,
January,
1837.

JOEL STEVENS v. RALPH HEAD.

A conveyance of a right to use a patent right in a limited territory is not required to be recorded in the patent office.

Where a right to use an invention, secured by patent, is conveyed, and the vendee has not been disturbed in the exercise or use, the vendee must shew that the person conveying has no such right, if he seeks to recover against the vendor, on the ground that no right was conveyed.

Where, on the purchase of a patent right, notes are given for the consideration, and those notes are paid after the purchaser had full knowledge, or the means of knowledge of all the facts, such payment is voluntary, and there cannot be a recovery back of the sum paid; although the purchaser might have avoided payment of the notes for want of consideration.

This was an action of assumpsit for goods sold and delivered, and money had and received, in which the plaintiff sought to recover the amount of certain promissory notes, given by him to the defendant, and subsequently paid, the consideration of which notes was the conveyance, by deed, from defendant to plaintiff, of the exclusive right to make, use and sell, within certain parts of the states of Vermont and New York, "an improvement in the machine for grinding apples for making cider, called a cider-mill." The original letters patent were granted to Constantine H. Wicks, and the deposition of the superintendant of the patent office was offered by the plaintiff, to shew that no assignment of "the whole or any part of the letters patent," from the patentee to the defendant, had ever been recorded in that office. This was the only evidence, offered by plaintiff, to prove that the defendant had no right to vend said patent, and had no conveyance of the same from the patentee, nor was there any attempt to shew any fraud or deceit on the part of the defendant. The schedule, attached to the letters patent, was read, and the plaintiff insisted that, from matters apparent on the face of said schedule, the letters patent were void.

The County Court decided, that, upon this evidence, the law would not warrant a recovery. Whereupon the plaintiff became non-suit, with leave to move this court to set aside the non-suit; and the case came here upon that motion.

G. W. Harmon, for plaintiff.

I. The defendant having obtained no right to the patent, this action lies to recover back the consideration paid.

From the word "grant" the law implies a covenant, on the

part of the grantor, that he has a title. Bac. Abr. Covenant, B. Platt on Cov. 47. *Style v. Hearing*, Cro. Jac. 73. *Iggulden v. May*, 9 Ves. 330.

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On the sale of personal property there is an implied warranty as to title. 2 Bl. Com. 451.

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If the defendant holds an assignment from the patentee, still he has no title, as he omitted to procure the assignment to be recorded in the patent office. 2 Laws U.S. 348. Sec. 4.

The plaintiff paid his money, &c. under a mistake, supposing the defendant had a title—and this action lies to recover back the money. 1 Wheat. Sel. 69 *Cripps v. Reade*, 6 T. R. 606 *Shearer v. Fowler*, 7 Mass. Rep. 31. *Matthews v. Hollings*, 1 Wheat. Sel. 69, note 35.

The defendant conveyed the original cider mill, as well as the improvement. A person, making an improvement in a machine in existence, does not thereby acquire a right to use the original. 2 Pet. Cond. R. 361. *Ordiorne v. Winckley*, 2 Gallis. Rep. 51.

When the grantor or vendor has no title to part of the property sold, which is not capable of being separated, the vendee may rescind the contract and recover back the consideration money. *Chambers v. Griffith*, 1 Esp. Cas. 150. Sugden's Vendors, 187. *Scurfield v. Gowland*, 6 East. 241.

The burden of proof lies on the defendant to show he had a title. *Hayden v. Hayward*, 1 Campb. Rep. 180.

11. The patent being void, an action lies to recover the money back.

The payments made are not to be regarded as voluntary. *Bize v. Dickason*, 1 T. R. 295. *Cobden v. Kendrick*, 4 T. R. 432. 1 Wheat. Sel. 65, 67. 1 Comyn on Con. 448. 2 do. 49.

It is not necessary for the plaintiff to show a fraud. *Jaques v. Golightly*, 2 Black. Rep. 1073. *Shearer v. Fowler*, 7 Mass. Rep. 31. *Cripps v. Reade*, 6 T. R. 606. *Matthews v. Hollings*, 1 Wheat. 68, 69, note 35. 2 Com. Con. 128. *Shove v. Webb*, 1 T. R. 782. Peake's Cas. 109. *Hicks v. Hicks*, 3 East. 16.

It is not necessary for the plaintiff to show the patent set aside, or that he applied to the defendant to procure a new patent. *Scurfield v. Gowland*, 6 East. 241. *Chambers v. Griffiths*, 1 Esp. Cas. 140.

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Warner & Briggs, for defendant.—The plaintiff is not entitled to recover back the money paid by him for the assignment of the patent, when it is not pretended that any fraud was practised by defendant, or misrepresentation made by him, and when plaintiff had as much knowledge of the value of invention as defendant. 4 Bos. & Pul. 260 and note.

The patent would be taken as good, until repealed by some proper proceeding. 1 Swift's Dig. 399. *Williams v. Hick*, 2 Vt. Rep. 36. *Taylor v. Hare*, 1 N. R. 260. 1 T. R. 286. 2 Stark. Ev. 114.

The testimony, offered by plaintiff to prove that defendant had no right to make the assignment, was insufficient.

I. Because it did not tend to prove that defendant had no right to make such assignment. It is unnecessary that an assignment of a partial interest in a patent should be recorded in the patent office.

II. If it is necessary that a record of an assignment of a patent should be made in the patent office, to protect all the interest of the assigned, still an assignment made, and not so recorded, where the assignment has not been interfered with, would not entitle the assignee to recover back the consideration paid.

The opinion of the court was delivered by

WILLIAMS, Ch. J. This action was brought to recover certain sums of money paid, and for the value of goods delivered, by the plaintiff to defendant, in payment of notes, which were executed by the plaintiff, and by the plaintiff and his surety to Strong & Head. The suit was originally commenced against Strong & Head. The notes, it appears, were executed on the purchase by the plaintiff from Strong & Head, of the right of making, constructing, using and vending to others to be used, an improved cider-mill, in different parts of the State of Vermont, for which a patent had been obtained, by one Wicks. The plaintiff claims that no consideration passed for the notes, that the money and goods paid thereon were paid without consideration, and that, therefore, he is entitled to recover back the same in this form of action.

It is to be observed that no fraud or deceit is imputed to the defendant, nor has any thing transpired, since the execution of the notes, to impair the right, whatever it was, which was conveyed to the plaintiff.

Some questions have been made to the court, which it may be well to notice, although the decision of them may not be necessary to determine the case before us. The plaintiff has contended, that the defendant had no right to make the conveyance, which was the consideration of the notes, as he had not procured his assignment from Wicks to be recorded; or, at least, that it was incumbent on him to shew his right, after the deposition of the superintendant of the patent office had been read. Our opinion is against the plaintiff on both of these positions. We think that an assignment of a particular interest in a patent right, or a conveyance of a right to use an invention, in a limited territory, is not required to be recorded in the patent office, by the laws of the United States. And as the plaintiff has not been disturbed in the exercise of the right, as conveyed, if it was essential to his right of recovery to prove that Wicks, or his assignees, had never conveyed to the defendant, or authorized him to make such conveyance as he did, the burden of proof was on him; as it was equally convenient for him to make such proof, as for the plaintiff to prove the affirmative. It also may be worthy of consideration, whether the plaintiff has not misconceived the action, if the word "grant" in the indenture implies a covenant of title, as he contends.

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J.
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In the case before us it appears, that notes were given by the plaintiff for the purchase; that these notes were afterwards paid. If the patent was void for any of the reasons, which have been urged, either party had equal means of ascertaining it; and no misrepresentation was used by the defendant, nor any concealment of any material fact within his knowledge. The payment, therefore, by the defendant, was purely voluntary, with a full knowledge, or means of knowledge, of all the facts in relation to the transaction; and to permit a recovery, under these circumstances, would contravene a plain and acknowledged principle of law. *Brown v. McKinally*, 1 Esp. Rep. 279. *Marriot v. Hampton*, 2 Esp. 346.

There is manifestly a wide difference between permitting the maker of a note, given for a patent, void on its face, to avail himself of the want of consideration, as a defence, (and such was the case from 13 Wend.) or allowing him, after he has paid such a note, to recover back the sum paid. Of the case of *Corbin v. Kendrick*, 4 Term. Rep. 481, which is relied on to shew, that the payment was not voluntary, it is only necessary to re-

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mark, that the question, whether the payment was voluntary, does not appear to have been raised, and moreover, the law upon the subject of voluntary payment, probably, was not fully settled at that time ; the only point, made in the court of King's Bench, was a question of evidence in relation to the admissibility of an attorney to testify to communications from his client. Starkie, in his treatise on evidence, Vol. 2. p. 118, treats it as a case, where money has been paid on compromise of an action, the compromise having failed and another action brought. The case itself cannot be considered as an authority for the ground taken by the plaintiff in this action. We do not discover any error in the views taken by the County Court. The plaintiff, therefore, takes nothing by his motion.

HODGES & SPAULDING v. ELI S. GATES.

Rutland,
January,
1837.

A person in possession of land, by conveying his interest to another, becomes tenant to that other, so long as he retains possession, and the grantee, as landlord, is liable to ejectment by a third person.

This was an action of ejectment for a lot of land in Sherburne. Upon the trial in the County Court, the plaintiff, having proved his title, read in evidence a deed to the defendant from Abel F. Daine dated 16th Dec. 1834. It appeared that said Abel F. Daine, was to have the use of the land for one year after the date of the deed.

To prove possession, the plaintiff called Rufus Richardson, who testified that Daine left the possession of the land in question, in May, 1835 ; that he, (Richardson,) proposed to purchase the growing crops of said Daine, but declined doing so, until he could ascertain whether the defendant had any claim upon them or not, and, for that purpose, Daine procured the following certificate, in writing, from the defendant, that he had no such claim.

" May 6, 1835. This may certify that I have no claim on the grass nor grain on the lot of land, that I bought of Abel F. Daine, in Sherburne. It is the same land, that Abel F. Daine had of

James Daine, and I agreed that said Abel should have the use of the farm this year. (Signed) ELI S. GATES."

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1837.

Upon the receipt of this certificate, Richardson purchased the crops of the said Abel, and cut the grain and grass for that year.

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The plaintiffs' title was admitted.

Upon this evidence, the counsel for the defendant requested the Court to charge the Jury, that the evidence was insufficient to prove the defendant in possession by his tenant, Daine. But the Court refused so to charge them, but did charge them, in substance, that if they believed the evidence, it was sufficient to prove the defendant in possession, and, thereupon, the Jury returned a verdict for the plaintiffs. To this charge of the Court the defendant excepted.

A. W. Broughton, for defendant.

The plaintiff must show defendant in actual possession, at the time of issuing the writ. *Skinner & Hurd v. McDaniel*, 4 Vt. Rep. 418. 2 Stark. Ev. 540. 1 Wils. Rep. 220. 1 B. & P. Rep. 573. 7 T. R. 327.

_____, *for plaintiff.*

The instructions of the County Court to the Jury, that the evidence, introduced by the plaintiff, was sufficient to prove the defendant in possession of the premises, were correct.

1st, Because the defendant receiving a deed from Abel F. Daine, with an agreement between Daine and him, constituted Daine a tenant under the defendant.

2nd, Because the certificate, signed by the defendant to Richardson, shews that the defendant held and exercised a control over the premises and the growing crops.

Richardson, in effect, acted under the defendant, and by his license, in cutting the grain and grass.

The defendant's title, by his deed from Daine, with those acts, was a sufficient possession, on the part of the defendant, to make him a party to the suit.

The opinion of the court was delivered by

PHELPS, J. The only question in this case is, whether the defendant was in possession of the demanded premises, in such sense, as to subject him to the action of ejectment. It appears that one Daine was, in fact, in possession, who had previously conveyed his right in the premises to the defendant, with an agreement that he (Daine) should retain the use and occupancy of the land for one year.

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January,
1837.

Hodge &
Spanking
v.
Gates.

It is very clear, that Daine, by this arrangement, became the tenant of Gates, the defendant, and, under our statute, requiring the landlord to be joined with the tenant, an ejectment could not be sustained against Daine alone. It would be absurd to hold, that, under these circumstances, the action would not lie.

Judgment affirmed.

Rutland,
January,
1837.

JOHN W. FREELove v. REUBEN SMITH.

A person, who has acted as grand juror in prosecuting for an offence before a justice of the peace, is incompetent to try a civil action, brought to recover redress for the supposed criminal act.

This was an action of trover. On the trial in the County Court, it appeared in evidence, that, before the commencement of this suit, Isaac Wheedon, the justice of the peace, before whom this action was brought, and by whom it was tried, made a complaint, as grand juror for the town of Pittsford, against the defendant, for stealing the articles in question. The complaint was made to S. H. Kellogg, justice of the peace, and the articles were described as the property of the plaintiff. The taking and carrying away, alleged in the complaint, were the conversion, for which this action was brought. It further appeared that, when the defendant was arraigned before justice Kellogg on the complaint, above mentioned, the said Isaac Wheedon appeared in support of the complaint—argued the case, and contended before the justice, that the said Smith should be held to trial, on the said complaint. The said Reuben was, however, discharged. It also appeared, that, on the Monday after the trial of the said complaint, Wheedon said he believed defendant was guilty of taking Freelove's money, that justice Kellogg ought to have bound him up to the county court, and if he, Wheedon, had been the court, he should have done so, as there was proof enough for that purpose. This action was afterwards brought before the said Wheedon, as a justice of the peace. The defendant appeared before the said Wheedon, and moved to dismiss the action, for that the said justice ought not to take cognizance of the same, for the reasons before mentioned. The justice overruled the motion and the cause was

appealed by the defendant, to the County court. The defendant renewed the motion to dismiss in the county court and that court decided that the action should be dismissed—to which decision the plaintiff excepted.

*Estland,
January,
1837.*

*Freelove
v.
Smith.*

— *for plaintiff.*

1. The justice was not of counsel, nor did he act as attorney to either party.

2. Nor has he undertaken to advise or assist either party in the cause before him.

3. Nor had the justice acted as an attorney in a cause in which he had been a justice.

A justice's court is a court of limited jurisdiction, created by statute, and that statute must have a literal construction, and nothing can be inferred to curtail or enlarge the jurisdiction. *Paine v. Eli*, D. Chip. Rep. 39. *State v. Bacheldor*, 6 Vt. Rep. 484.

S. Foot, for defendant.

This case comes within the intent and spirit of the statute, page 131, Sec. 24. p. 63, Sec. 20, and p. 557, Sec. 4.

The opinion of the Court was delivered by

PHILIPS, J.—This case was dismissed by the court below, upon the ground, that the justice, before whom the action was brought, and from whom it came up by appeal, was not competent to take jurisdiction of it.

The exception to his competency is, that he had previously acted as counsel in a cause growing out of the same transaction, and involving the same question of fact; in short, that he had instituted a criminal prosecution, which he conducted as counsel, and then took jurisdiction of a civil suit, brought to recover for the same act, which constituted the supposed offence.

The statute, p. 131, of the revised laws, prohibits a justice of the peace from acting as counsel or attorney, in a cause, in which he has acted as justice. But it does not, in terms, prohibit his acting as justice, where he has acted as attorney.

The 20th Section of the judiciary act, page 63, prohibits the judges of the higher courts from acting as judges in cases, where they have been attorneys or of counsel.

The statute, also, prohibits State's attorneys from taking any fee or reward, from any party to a civil cause, growing out of any transaction, which occasioned a criminal prosecution, conducted by them.

Roths, Jr.,
January,
1837

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How is this difference to be accounted for? Did the Legislature intend to prohibit the less evil and permit the greater? Or did they intend to restrict the judges of the higher courts, and rely, in the same particular, upon the discretion of inferior magistrates? The situation of a grand juror, prosecuting before a single magistrate, is precisely the same with that of a State's attorney, prosecuting before another court. The latter is forbidden even to take a fee, as counsel, in a civil cause having a common origin with a criminal prosecution conducted by him. Shall the former be at liberty to act, not merely as counsel, but as judge in a similar case?

Here is an apparent inconsistency, which can be accounted for, only upon the supposition, that the legislature did not anticipate a case like this. A literal construction of these statutes results in an inconsistency too glaring to be adopted. We consider this case as within the spirit of these statutes, and are, therefore, of opinion, that the suit was properly dismissed. A consideration of the consequences, which might follow from countenancing such a procedure, impels us to this conclusion. If we hold the magistrate to be competent, in this instance, we authorize a party in a justice's court to withdraw his action, if he find his success doubtful, and renew it before his own counsel.

Judgment Affirmed.

BENNINGTON COUNTY.

FEBRUARY TERM, 1837.

PRESENT, HON. STEPHEN ROYCE, }
 " SAMUEL S. PHELPS, } *Assistant Justices.*
 " JACOB COLLAMER, }

ZALMON PRINDLE v. SAMUEL COGSWELL.

Bennington,
 February,
 1837.

A justice has no jurisdiction of an action for breaking and entering the plaintiff's close and taking and carrying away his horse, 'to his damage \$100.'

This action was commenced before a justice of the peace, and went, by appeal, to the county court. The plaintiff declared against the defendant, for breaking and entering plaintiff's close and barn, and taking away his horse, of the value of ninety-nine dollars, and a rope halter, of the value of one dollar, and concluded to the damage of the plaintiff, one hundred dollars.

In the county court, the defendant moved that the action be dismissed, for want of appellate jurisdiction, in that court, of the cause of action. This motion was overruled. The defendant, then, pleaded the general issue, and a special plea in bar, that said horse and halter were taken, by virtue of a writ of attachment, duly issued, in favor of one John Botsford against the defendant. The plaintiff new-assigned another and different taking. There were further pleadings, terminating in a demurrer to plaintiff's sur-rejoinder. The county court rendered judgment for the plaintiff, and the principal question, reserved for the determination of this court, and the only one considered,

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was, whether the county court had appellate jurisdiction of the cause of action, as presented by the plaintiff's declaration.

Sargeant & Miner, for defendant.

This is an action of trespass upon the freehold. And although the declaration also alleges a trespass to personal property, yet this is not the gist of the action. 6 Jac. Law Dic. 290. 1 Chit. Plead. 176. 2 do. 429.

The term *close* is technical, and imports an interest in the soil. Every unlawful entering into a house, room, out-house or other building, or upon land, is a trespass to real property, or a *trespass upon the freehold*, within the meaning of the statute. 1 Chit. Plead. 173. 6 Com. Dig. 387. Stat. of Vt. 139, 140.

It would have been a sufficient answer to the declaration, to have shewn that it was not the plaintiff's close.

M. L. Bennett & S. Swift, for plaintiff.

The *ad damnum* in the writ corresponds, in amount, with the value, as alleged, of the personal property taken. From this it is evident, that, although the breach of the plaintiff's close is alleged, in form, perhaps, as a substantive injury, yet the plaintiff did not rely upon it as such. Such, too, seems to have been the construction put upon the declaration by the defendant. For he has left the breach of the close entirely unanswered, and has answered only as to the rest. This allegation, therefore, seems to have been intended by the plaintiff, and regarded by the defendant, as descriptive merely, to identify, beyond mistake, the trespass declared upon, by pointing out the exact place where committed. And this was the more necessary, inasmuch as the pleadings show a taking of the same property on, at least, two occasions.

The opinion of the court was delivered by

PHELPS, J. This action is, on the face of the declaration, trespass on the freehold. It alleges that the defendant broke and entered the plaintiff's close, &c.; and seeks to recover compensation for the injury. It is very clear that the plaintiff *may* recover for the injury to the freehold, and, if so, then the justice cannot try the whole cause, if he cannot take cognizance of that injury. And as the amount claimed exceeds the jurisdiction of the justice in such cases, it follows that he has no jurisdiction of the case. The matter here alleged, by way of aggravation, might have been alleged, substantially, as a personal tres-

pass ; but it is not so. It is on the face of the declaration, *prima facie* at least, mere matter of aggravation, and whatever is a justification, as to the breaking and entering, *prima facie* defeats the action.

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A new assignment might, indeed, avoid such a defence, as in *Hubbel v. Wheeler*, reported in Aikens. That was trespass upon the freehold, alleging, by way of aggravation, the seduction of the plaintiff's daughter. The plea was not guilty, with notice of a justification of the trespass, under a license to enter the house. The court held, that proof of a license to enter the house would defeat the action, were it not that the plaintiff might new-assign, abandoning the trespass on the freehold, and charging the seduction, as a substantive trespass, and had the same rights, under the notice, which he would have under a new assignment, had the justification been specially pleaded. But in this case the difficulty is, that, upon the face of the declaration, the justice had no jurisdiction, the action being trespass on the freehold, and the sum demanded being over twenty dollars. This want of jurisdiction can not be helped by plea to the action, or any after proceeding ; because, the declaration shewing a case not within the jurisdiction of the court, it can not proceed at all.

If we consider this declaration as counting upon several trespasses, still the difficulty is not removed. If the court had no jurisdiction of the trespass upon the freehold, it does not help the jurisdiction to join a count in trespass, *de bonis asportatis*. We cannot distinguish between the damages claimed for one or the other.

Finally, if we sustain this action, we virtually repeal the limitation in the act giving the justice jurisdiction ; for the party has only to include in his declaration something which might lay the foundation of an action of trespass to personal property, and, upon the plaintiff's doctrine, the justice would have general jurisdiction of the trespass upon the freehold.

Judgment of the county court reversed, and the action dismissed, with costs.

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JOEL VOLUNTINE v. CALEB GODFREY.

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Where there is an express promise to pay a certain rent, and the premises are actually occupied and not surrendered by the tenant, during the term, assumpsit for use and occupation may be sustained and the whole rent recovered, though most part of the premises were consumed by fire during the term and there was no written contract.

This was an action of assumpsit. One count was for use and occupation of certain premises, being, principally, part of a woolen factory, and certain tools, machines and privileges. This action was, by consent of the parties, submitted by rule of court to referees, who made report to the County court in substance, as follows; that the plaintiff's claim before them consisted of but two items, to wit, fifteen dollars and fifty cents paid for defendant for insurance. This was not disputed. Also, three hundred dollars for use and occupation. In relation to this, they report, that the premises, with the privileges described in the plaintiff's declaration were, by the plaintiff, in April 1835, leased by parol to the defendant, for one year, for which the defendant agreed, by parol, to pay three hundred dollars; that in pursuance of said agreement, said defendant entered into possession, and occupied, until the 6th day of January 1836, when the factory part of the leased premises was burnt, and he continued to occupy, through the year, all that part of the premises not consumed. Godfrey, in the course of the year, delivered to the plaintiff one condense card, at the price of \$325.00, in payment of said rent, and, for the balance, the plaintiff was indebted to him. The referees allowed the defendant the said \$325, and allowed the plaintiff said \$15.50 in money, and rent at the rate of \$300 per year, up to the time the factory was burnt, and, after that time, only such sum as they adjudged the use of the remainder of said premises was worth. They reported that they intended to decide according to law, and submitted the revision of their proceedings to the court. The County court allowed to the plaintiff the whole rent of three hundred dollars, rendering judgment for the defendant, for a balance of only nine dollars and fifty cents, to which the defendant excepted, and the cause passed to the Supreme court.

J. S. & U. M. Robinson, for defendant.

It is admitted that, upon an *express covenant*, the lessee is bound to pay rent, notwithstanding a destruction of the premises, upon

the principle that the obligation to pay is created by the act of the party. *Paradine v. Jane*, Alleyne's Rep. 26. Bennington,
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So, too, in the action of assumpsit for use and occupation, where the agreement is in writing, and, therefore, valid by the statute of frauds. 4 Taunt. Rep. 45. Voluntine
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In that case, also, the liability to pay is created by the act of the party.

But when there is a parol contract, as contra-distinguished from a written one, for the hire of premises, the parol contract is void by the statute of frauds. And if the tenant never occupies, no compensation can be recovered; or if the tenant does occupy, he is liable only in respect of his occupation. Swift's Dig. 132.

The liability of the tenant, to pay for the use and occupation, is, therefore, created by law—and he is excused, if the premises are destroyed, upon the distinction, in the books, between an obligation imposed by law, and one created by act of the party. 1 Dall. Reports, 210. 1 Swift's Dig. 13.

Lyman & Southworth, for the plaintiff.

The referees should not have apportioned the rent.

I. The rule is well settled, that where there is an express covenant to pay rent, and no exception is made for cases of destruction by fire, &c.—the rent may be recovered for the whole term, though the premises be destroyed. 2 Saund. Rep. 422, note 2, and cases cited. 2 Ld. Raym. 1477. 2 Stra. 763 and cases cited. 3 Johns. Rep. 44. 6 Mass. Rep. 63. 1 Term. Rep. 312 & 708. 6 Term. Rep. 688.

II. Nor is there any sound distinction between agreements to pay rent under seal, and those not under seal. *Baker v. Holtzapfaffell*, 4 Taunt. 45. Sel. N. P. by Wheaton, 551. *Boot v. Wilson*, 8 East. 311. 5 T. R. 141.

That this action is an equitable action will not help the defendant. Courts of equity will not enjoin suits, brought to recover rent, when there has been a destruction of the premises by fire. 1 Maddock's Ch. 38. 18 Vesey, 115. 3 Anst. 687.

As to its being against equity, that the plaintiff should recover, it will be seen that cases have gone much further than this—as when the premises are no longer occupied—when there was an offer to surrender, and when the lessee neglected to re-

Beaumont, February, 1837. build, though he had covenanted so to do. 3 Johns. 44. 18 Ves. 115. 1 Term. Rep. 310.

Voluntine v. Godfrey. III. Though the agreement to pay rent be by parol—still we believe the rule will be the same.

The same reasons exist for enforcing such an agreement—thus, in each case, the lease is *a sale* of the premises for the term. The lessee continues to hold the land—and the lessor cannot re-enter. The obligation to pay is a *duty created by the act* of the party, and might have been provided against.

Though, by the statute, we are prevented from maintaining an action on the agreement, still, the agreement should furnish *the rule of damages*, and, for that purpose it is not void—the defendant having occupied during the term—and claiming only that the premises were *lessened in value*, without the fault of the lessor.

At any rate, a part of the property destroyed was not within the statute, being personal property. On what principle are we deprived of the rent for that?

But, admitting we could maintain no action upon the agreement, and that it did not furnish the rule of damages, on no *principle could the defendant recover back money paid under the agreement.*

Though the referees speak of the machine as having been *applied in offset*, yet, they tell us, at last, that it was *delivered in payment of the rent*, except \$25, part of the price.

The defendant, then, is in the attitude of *a claimant* under the statute, not of a *resister of claims*. He would use it as *a weapon of attack, not of defence*. We believe he could not succeed in this, had he chosen never to enter into the occupation of the premises at all—the plaintiff doing nothing to prevent him—it would be contrary to the whole current of authorities on this subject. 1 Swift's Dig. 260, 261, 136. 1 Stark. Selw. 12. 2 N. P. 67. Peake's N. P. 6. 15. *Philbrook v. Belknap*, 6 Vt. Rep. 383.

But it was presented as *a defence*.

By pleading payment, a defendant is estopped from saying the contract was by parol. 1 Swift's Dig. 265. Peake's N. P. C. 15.

In this case, the defendant never attempted to rescind the contract. It is not in the power of the lessee after occupying premises during the term, and paying rent agreeably to the contract,

to treat it as a nullity, and recover back the difference between the actual value, and what was paid.

The opinion of the court was delivered by

COLLAMER, J.—Under the statement of facts reported, is the plaintiff entitled to sustain this action? At common law, every reservation of rent was considered as of the realty, and to be recovered by distress or debt, and this, whether by deed or by parol. This did not arise from any writing, required by the statute of frauds and perjuries, for it was so before this act was passed. *Dartnal v. Morgan*, Cro. Jac. 598. Yet, when there was an actual use by permission, and an *express promise* to pay, in consideration of the permission to occupy, this was not considered as a lease and reservation of rent, and assumpsit might be sustained. This created much difficulty as to the form of the action; to relieve which the statute of 11 Geo. 2. Ch. 19, was passed, which gives assumpsit in all cases, except where the demise is by deed. Here, there was an *express promise* to pay, and actual occupancy, by permission, and, therefore, this action of assumpsit can be sustained at common law, Whether that express promise is by word or by writing, is immaterial, if it is not by deed. It is not now necessary to inquire what could be done with a case of use, with no express promise to pay.

The contract between these parties amounts to this. In consideration that the plaintiff will permit the defendant to take possession of the plaintiff's factory, tools, machinery and privileges, and use and occupy them one year, the defendant will pay the plaintiff 300 dollars. The plaintiff does permit the defendant so to do, without any molestation by the plaintiff, or surrender by the defendant. This is the contract, and this is in substance the declaration. How much is the plaintiff entitled to recover?

It is undoubted law, that, where the defendant expressly agrees to pay rent, he must pay, though the buildings be consumed, as he has not guarded himself against such a contingency, by any exception. It is now insisted that this is peculiar to specialty or covenant. This is not so. The case of *Baker v. Holtzaffell*, 4 Taunt. 45, was not a deed, yet the tenant was compelled to pay the whole rent. It is further insisted, that the contract was for the sale of an interest in land, and void by the statute, and that, as no action can be sustained thereon, it should be wholly laid out of the case, and the plaintiff recover

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only so much as the defendant actually had the use of. Our statute does not declare a parol contract, in relation to an interest in land, *void*. It only provides that no action shall be sustained thereon. Therefore a count, declaring on such a letting, as an executory contract, could only be sustained by a written contract. But this statute, like the other clauses in the same section of the English statute of frauds, is entirely inapplicable to contracts *executed*. That statute provides that no action shall be sustained on a parol contract not to be performed within a year. Yet, if such a contract be made, and the service be performed, and action be therefor brought, the price fixed by this parol contract is the measure of damages. If a parol contract be made to give \$5,000 for a certain farm, and the conveyance be actually made and accepted, and possession taken, most undoubtedly an action may be sustained for the \$5,000, notwithstanding it was agreed *by parol*, and though no action could have been sustained on it, as an executory contract. So, in this case, the contract was *executed*. The plaintiff sold the defendant the occupancy of certain premises, and delivered them. The defendant *agreed* to pay therefor a certain sum, and he made no exceptions. He has had that occupancy, without molestation from the plaintiff, and without surrender by himself. It is *executed* on the part of the plaintiff, and is binding on the defendant.

Judgment Affirmed.

SIMEON KIMPTON v. HORATIO WALKER.

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The covenant, arising out of the words "yielding and paying," in a lease, is an implied covenant and the lessee is not liable on it for rents accruing after an assignment of his term.

This was an action of covenant broken, in which the plaintiff declared upon a lease executed by him to defendant, on the 8th day of January 1814, of certain premises in Manchester, at an annual rent of twenty-five dollars, to be paid by defendant to one James Borland. The breach alleged was the non-payment of the several rents, from the execution of the lease to the date of plaintiff's writ. The lease contained no covenant, *in terms*, on the part of the lessee, for the payment of rent, the demise being upon the condition of his "yielding and paying" the rent specified.

The defendant pleaded several pleas in bar. The third plea, after alleging payment of the said several annual rents from the date of said lease to and including the rent due in the year 1817, proceeded as follows, viz:

And the said Horatio, in fact, saith that, after the making of the said indenture in said declaration mentioned, before any part of the rent in said declaration mentioned, for the year 1818, and afterwards, became due, and before any breach of covenant on his part, to wit, on the twenty-third day of March, 1816, at Manchester aforesaid, he, the said Horatio, by a certain indenture of assignment, then and there made and duly signed by the said Horatio, and sealed with his seal, and then and there acknowledged by the said Horatio, and attested and recorded in due form of law, did then and there bargain, sell, assign, transfer and set over, for the consideration therein mentioned, to one Nathan Ball, his heirs, executors, administrators, and assigns, one equal undivided half or moiety of all the right, title, interest, unexpired property, claim or demand of the said Horatio in and to the said demised premises in said declaration mentioned, so long as grass shall grow and water run. By virtue of which said last mentioned indenture of assignment, the said Nathan Ball, afterwards, to wit, on the twenty-third day of March, A. D. 1816, at Manchester aforesaid, entered into the said demised premises with the appurtenances, and then and there became and was possessed of one undivided half or moiety thereof, for the residue of said term then to come therein,

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and unexpired, whereof the said James, as well as the said Simeon, afterwards, to wit, on the day and year last aforesaid, at Manchester aforesaid, had notice. And the said Horatio in fact further saith, that, after the making of the said indenture in the said declaration mentioned, and before any part of the said rent for the year 1818, and afterwards, became due and payable, and before any breach of the said covenant, on his part, to wit, on the 26th day of March, A. D. 1817, at Manchester aforesaid, he, the said Horatio, by a certain other indenture of assignment, by him, then and there made, and signed and sealed with his seal, and then and there acknowledged by him, the said Horatio, and attested and recorded in due form of law, for the consideration therein expressed, did bargain, sell, assign, transfer and set over to the said Nathan Ball, his heirs, executors, administrators and assigns all the remaining right, title, interest, unexpired property, claim and demand whatever, of him the said Horatio in and to the said demised premises, in said declaration mentioned, so long as grass shall grow and water run; by virtue of which said last mentioned indenture of assignment, the said Nathan Ball, afterwards, to wit, on the day and year last aforesaid, at Manchester aforesaid, entered into the said demised premises, in said declaration mentioned, and then and there became and was possessed, exclusively, of the whole of the residue of said term, then to come therein and unexpired, whereof the said James, as well as the said Simeon, afterwards, to wit, on the day and year last aforesaid, at Manchester aforesaid, had notice.

And the said Horatio in fact further saith, that the said James Borland, with the knowledge and consent of the said Simeon, after the entry of the said Nathan into the said demised premises, in said declaration mentioned, under and by virtue of the said indentures of assignment, to wit, on the first day of March, A. D. 1818, at Manchester aforesaid, did accept and receive of and from the said Nathan a large sum of money, to wit, the sum of twenty-five dollars for the rent aforesaid, in the said declaration mentioned, and then and there with the like knowledge and consent of the said Simeon, accepted the said Nathan as his tenant of the said demised premises, in said declaration mentioned, and this the said Horatio is ready to verify, &c."

To this plea, "so far as it relates to the several breaches of covenant, in the declaration assigned, in non-payment of the said annual rent for the year 1818, and to the commencement of this

suit," the plaintiff demurred. The county court decided said plea sufficient, and rendered judgment that the defendant recover his costs. To this decision the plaintiff excepted.

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D. Roberts, jr. for plaintiff.

The words, on which the plaintiff relies, as creating a covenant, are these: "To have and to hold, &c. the said Horatio yielding and paying to James Borland, his heirs, &c. yearly and every year, so long as grass shall grow, or water run, the full and just sum of 25 dollars." These words constitute an express covenant, and not a mere covenant by implication of law.

These terms explain themselves; for an express covenant, or covenant in deed, as it is termed in some of the books, can mean nothing else, than that the expressions, used in the deed, do, of themselves, import an agreement; whereas a covenant, raised by implication of law, can mean nothing else, than that the words used do not, of themselves, express or imply an agreement, but that the law, for the sake of preventing injustice, or for better securing the enjoyment of the express covenant, attaches to certain words a technical force, which would not, otherwise, belong to them. The law raises the implication, as much as to say that no such implication is found in the words. Bac. Ab. Covenant B., Vin. Ab. Covenant F. 1 Swift's Dig. 353, 355.

The formal words, "covenant, grant," &c. are not necessary to make a covenant, but any form of words or mode of expression, which clearly evinces an agreement, will amount (being under seal,) to an express covenant. Bac. Ab. Covenant A., 1 Swift's Dig. 353. Vin. Ab. Covenant C. 21, & seq. 7. Petersdorff's Ab. 84. 2 Mod. 268. *Saltoun v. Houstoun*, 1 Bing. 433. 1 Sel. N. P. 469. Moore, 135. 1 Esp. N. P. 267. *Hallett v. Wylie*, 3 Johns. 44. See instances of covenants created by the use of participles and otherwise, without the formal words of covenanting. Bac. Ab. Covenant A., Com. Dig. covenant (A. 2.) Vin. Ab. Covenant S. 6.

The usual instances of covenants, by implication of law, are, where the words, *dedi*, *concessi*, or *demisi*, are used in a lease for years, being held equivalent to a covenant for quiet enjoyment. Bac. Ab. Covenant B. Yet these words, of themselves, import no such agreement; but, inasmuch as it is clearly unjust for one to assume the power of giving, granting, or demising what he has

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no authority to give, grant, or demise, the law attaches to the act done, rather than the words used, an obligation to secure the grantee in the enjoyment of the thing granted; and this obligation it fixes and enforces, by attaching an artificial force to certain technical expressions, and implying a covenant, where the words used do not, of themselves, import one. Hence appears a marked distinction between covenants express, and covenants in law, that, in one case, an agreement is found in the words used, without the aid of an artificial implication, and in the other case, not.

The words "yielding and paying," as here used, seem to import an agreement, on the part of Walker, to yield and pay, or they import nothing. And so it is said of these words, and the word *reddendo*, in *Bac. Ab. Covenant B. 1* *Swift's Dig. 355. 1 Sel. N. P. 470.* and note 7. *Giles v. Hooper*, *Carth. 135.*

These words do not create a condition of Walker's tenancy, but the whole language goes to create mutual covenants between Kimpton and Walker. They are so called in the indenture. 7 *Petersdorff's Ab. 73* and 100. *Boone v. Eyre* 2 *W. Blac. Rep. 1312. S. C. 1 Hen. Blac. 273. 2 Saund Rep. 155. 4 Day's Rep. 326.*

The words "yielding and paying" make an express covenant and not a covenant in law merely. 7 *Petersdorff's Ab. 85. Helyar v. Casbord*, 1 *Sid. 266. Newton v. Osborne*, *Sty. 387. Porter v. Sweetnone*, *Sty. 406, 431. Hollis v. Carr*, 2, *Mod. 87. S. C. Finch's C. R. 261. 1 Sel. N. P. 470, 471. 1 Esp. N. P. 267. 1 Swift's Dig. 354. Vin. Ab. Cov. C. 10.*

Some authorities may be found the other way, but they are either the opinions of book makers, or the unsupported *dicta* of single judges. Of this character are 1 *Saund. Rep. 241. b. note. 1 Sid. 447. 3 T. R. 402. 9 Ves. 330.*

It is a loose use of language, probably, that has led to this conflict of authorities; and it is apprehended, that these words have sometimes been regarded as creating a mere covenant in law, because the formal words of covenanting are not used, but the intention to contract is a subject of implication, from terms used, which are not the most apt and formal to express such intention. Hence these words may have been said to *imply* a covenant, or to contain *an implied covenant*; and from being said to contain or make an implied covenant, it would be easy

for an author to class these among *covenants raised by implication of law*; whereas, it is clear that, however informal or imapt the words may be, if an agreement can be inferred or implied *from them*, they constitute an express covenant. There is no such third class of covenants as *covenants implied*, and the term seems to be a misnomer. A covenant is implied only by the law, and is not found in the words used. See instances of this use of language in 1 Swift's Dig. 355. Vin. Ab. Covenant F. 1 Esp. N. P. 267. See also observations on this point in Hammond's parties to actions.

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This, then, being an express covenant on the part of Walker, binds him personally, and it is no defence to an action thereon, that he assigned before breach made by him, and that Borland accepted such assignee as his tenant. 1 Chit. Pl. 36. 112. 1 Sel. N. P. 475. *Port v. Jackson*, 17 Johns. Rep. 239, 479.

Another view may be taken of this case. The case shows sufficiently that Kimpton was the lessee of Borland, and stood bound to pay him, as rent, 25 dollars a year, &c. When he would have assigned, therefore, it became him to be discreet in the selection of his assignee, and, inasmuch as by assignment, the estate, out of which he could have raised the yearly profit, would pass from him, he ought not only to have chosen a responsible assignee, but should have bound him in such a covenant, as would make him (Kimpton,) perfectly secure against the operation of his covenant to Borland. This security could be attained only by binding his assignee to perform that covenant for him, and in his stead. Nor would this be driving a hard bargain with his assignee, and, at the worst, would be but passing over to his assignee, his (Kimpton's) covenant with Borland. It is under such circumstances, that Kimpton assigns to Walker all his interest in the premises.

Now let us assume that this is, in effect, a covenant by Walker, to perform for Kimpton his covenant with Borland, and see whether all the circumstances of the case are not consistent with this assumption, and inconsistent with any other. And

I. The situation of the parties is to be observed, as referred to above.

II. Kimpton's covenant with Borland is particularly referred to, to determine the days of payment; and the provisions as to the sum to be paid, the mode and times of payment, in the two instruments, are identical.

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III. Borland is, in no way, affected by this language of Walker. He can neither sue upon it, nor claim any benefit from it, nor can be injured by it. To be sure, so long as Walker occupied, or was assignee of the term, Borland could recover of him rent. But this, not by reason of any privity of contract between them, for it was not possible for Kimpton and Walker, by any arrangement between themselves, to have affected Borland, who claimed through neither of them. If, therefore, this language was introduced for the sake of Kimpton alone, and Borland is no ways interested therein, how could Walker's assignment and the acceptance of rent from such assignee, by Borland, affect the obligation of Walker's covenant with Kimpton? *Port v. Jackson*, 17 Johns. Rep. 479.

There are other considerations, which go to show that these words constitute a covenant personally binding upon Walker.

The deed is indented. The language of the deed, therefore, is, as well that of Walker as of Kimpton; or rather, where an act to be done by Kimpton is spoken of, the language is Kimpton's; where an act to be done by Walker, it is the language of Walker. "To have and to hold," &c. This is the language of Kimpton. "He the said Horatio, yielding and paying," &c. This is the language of Walker.

Again, this deed is expressed to be made "for the consideration of the covenants and agreements therein after mentioned, reserved and contained, on the part and behalf of the said Horatio Walker, &c. to be done and performed." Thus, it appears that no money or other valuable thing, paid or given, entered into the consideration of the deed, but the same was made in consideration of certain supposed covenants on the part of Walker, which covenants are created by the words relied on, or there are no covenants on the part of Walker in the deed, and so the deed was, in truth, made upon no consideration. And in Kimpton's covenant for quiet enjoyment, referring to these words, is this language, "he the said Horatio Walker, his heirs, &c. paying the rent, and performing all and singular the covenants and agreements, before, in and by these presents comprised, secured and contained on his and their part and behalf to be paid, done, performed and kept, shall and may quietly enjoy, &c."

Again, it is perhaps a consideration entitled to some weight, that this 25 dollars is not denominated rent. There was a propriety in this, for the idea of rent is, that it is payable as a re-

turn for the possession of lands and tenements. It must, therefore, be rendered to the person, from whom the lands or tenements pass. Hence a reservation of rent to a stranger is void. *Co. Lit.* 143. b. 3 *Kent's com.* 463.

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In this case, the land passed from Kimpton, but the payment was to be made to Borland. This is something, therefore, more than a mere *reservation of rent*, or it is nothing. Even had the word "*rent*" been used, it must have been regarded like the case, where an annuity, under the name of rent, is granted out of an incorporeal hereditament, which would operate as a personal contract, and oblige the grantee to pay the money reserved, although it would be no legal rent in contemplation of law. 2 *Bl. Com.* 42.

Again, it is worthy of observation, that Walker covenants for himself alone, and does not name his assigns. There was a propriety in this, too, for the covenant is to pay a collateral sum to a stranger, and sums to be collateral to and not concerning the thing demised; so that had Walker's assigns been named, they would not have been bound by the covenant. *Spencer's case*, 5 *Rep.* 17. 1 *Sel. N. P.* 507.

If the preceding views be correct, it is a matter of no consequence in this case, whether, in the ordinary cases of lessors and lessees, the words "yielding and paying" make an express covenant or a covenant in law.

P. Smith, and A. L. Miner, for defendants.

The defendant is not subject to the payment of rent, after he assigned his interest in the lease, and the lessor accepted the assignee as his tenant. It is admitted that the common law of England makes the original lessee responsible, on all express covenants, notwithstanding an acceptance of the assignee of lessee by the lessor. It is believed, however, that the courts in this country will not adopt the principle; for it clearly appears, that it originated in a mistake, and is not well founded. *Ham. Parties*, 129. The case before the court does not call for a determination of the question.

The lessee, at all events, is not liable on covenants in law, after he assigns his interest, and the lessor accepts of the assignee, as his tenant, by receiving rent, or otherwise. 1 *Chitty Pl.* 36, 112; *Bac. Ab. Covenant E* 4; *Debt. D.*; 1 *Saund. Rep.* 241, note 5; 1 *T. Rep.* 92; 4 *do.* 94, 98, 100; 7 *do.* 345; *Cro. Jac.* 523.

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There is no express covenant in the lease, on the part of the defendants to pay rent. The terms, "yielding and paying," do not constitute an express, but an implied covenant, or a covenant in law. 1 Saund. Rep. 241, b. note 5. Bac. Ab. Covenant B; Com. Dig. Covenant A. 3; Platt on Covenants, 50; *Harper v. Burgh*, 2 Lev. 206; *Webb v. Russell*, 3 Term. Rep. 402; *Vyryan v. Arthur*, 1 Barn. & Cress. 416; S. C. Dow. & Ry. 670; *Iggulden v. May*, 9 Ves. 330; *Church v. Brown* 15 Ves. 264; *Mills v. Auriol*, 4 Ter. Rep. 98.

The opinion of the court was delivered by

PHELPS, J.—This case coming before us upon a demurrer to the defendant's third plea in bar alone, we have no concern with the other issues determined in the court below.

The sufficiency of the third plea depends upon the nature and effect of the covenant declared on. It is to be remembered, that there is, in the lease in question, no undertaking in terms, on the part of the lessee, to pay the rents. The demise is made to him upon the usual terms, he "yielding and paying" certain rents therein specified. These words, "yielding and paying," &c. however, imply a covenant, and the acceptance of the lease, upon these conditions, by the lessee, is, in legal construction and effect, a covenant or undertaking to pay the stipulated rent. This, I apprehend, is upon the principle, of such common application in cases of simple contract, where the law implies a promise from the act of the party, although none is, in fact, made. Thus, if he buy goods at a stipulated price, the law implies a promise to pay that price, although none is, in terms, made. So, in this case, the acceptance of the lease, upon the terms expressed in it, is becoming a party to the contract, in all its particulars, and involves, as a necessary legal consequence, an obligation to pay the rent. The contract being under seal, the undertaking, involved in becoming a party to it, assumes, of course, the technical form of covenant, and, hence, the doctrine of implied covenants is analogous to that of implied assumpsit.

The case is the same with one, who becomes a party to the lease by assignment of the term; he being liable to an action of covenant for the rents, although not an original party to the instrument, upon the principle already stated. Now, with respect to him, it cannot be said, in strictness, that he covenanted "in and by the indenture;" for at the time, when the instrument took effect, he was not a party to it. But, upon taking the as-

signment of the term, upon the conditions of the lease, the law implies a covenant or undertaking on his part to pay the rent. So it is with each successive assignee ; and, hence, it is said that the covenant runs with the land. In other words, the covenant is incident to the estate, and whosoever takes the one, is considered to have voluntarily assumed the obligation of the other. If it be asked, why, in this view of the subject, the remedy is not by assumpsit, the answer is, that this doctrine was settled long before the action of assumpsit came into general use.

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So far, there is no difficulty in the subject, nor is it of any importance, whether, the covenant growing out of the words "yielding and paying," is considered an express or implied covenant.

But here a question arises. Suppose the lessee assigns his term, is he liable personally in the action of covenant, for rents, which thereafter accrue ? Or, in other words, is there then subsisting a personal covenant, distinct from and independent of the covenant which runs with the land. Or, to state the question more particularly, with reference to this case, does the assignment involve a guaranty, on the part of the assignor, of the performance of the terms and conditions of the lease by the assignee ?

It is said in the books, that, if the covenant be *express*, the lessee is bound, so long as the term endures ; but if implied, he is discharged whenever he is divested of the estate. The question then becomes this. Is the covenant created by the terms, "yielding and paying," an express or implied covenant ? Although the rule above mentioned, appears to be well settled, yet, upon the question, what is an express covenant, there is great confusion in the books. Indeed, whether the covenant in question be express or implied, is a question upon which the authorities are so contradictory as to furnish little aid in its solution. The manner, in which the point is treated by elementary writers, may furnish a fair specimen of the confusion, which has prevailed on the subject.

Bacon classes this covenant with implied covenants. He thus illustrates the distinction : "A leases to B, rendering rent, and B. covenants to pay it, B. is liable after assignment, it being upon an express covenant ;" cites Brownl. and Sid. 447. Bac. A. Covenant E. 4.

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Viner, (Cov. F.) says such a covenant is a covenant in law, or implied, and cites Brownl. 215. Dyer, 15th Hen. 8th. He also (Cov. C.) cites 2 Lev. 206. to shew it a covenant in law, and Sty. 387, 407 to prove it express.

Selwyn says it is an express covenant, and cites Styles 407. But cites Sid. 447. 1 Saund. 241. note 5. and 3 T. R. 402. *contra*.

Chitty cites, as cases of express covenant, 1 Saund. 241. and note. 1 T. R. 92. 7 do. 345. H. Black. 433. 4 T. R. 94, 100, and as implied, Sid. 447. W. Jones 223. Cro. Jac. 525.

In Petersdorff's Abr., Roll. Abr. is cited one way, and Siderfin the other. Swift classes them with covenants in deed, or express covenants, yet he says the words, "yielding and paying," *imply* a covenant.

Sergeant Williams, in his note to Saund. 441. lays it down, that the covenant is implied.

In short, the old authorities appear quite contradictory, and the elementary writers have handed them down to us as they are. On the whole, however, the weight of authority, and especially modern authority, appears to be in favor of holding these covenants implied.

The difficulty seems to have arisen from the indefinite use of the terms "express," and "implied," as having reference to the thing to be done, on the one hand, or the act of assuming the obligation, on the other. Thus, the expression "yielding and paying rent," expresses the thing to be done, and, in that sense, the contract is express. Yet the words are introduced, in form, as a condition of the demise, and are susceptible of such a construction. Still the question, whether the lessee incurs a personal liability to be enforced by action, is not necessarily involved in the phraseology, but is left to legal construction or implication. It is true, that, by acceptance of the lease, the lessee becomes liable for the rent; but it is impossible for me to distinguish the origin of his liability from the ordinary case of an implied assumpsit, where the obligation arises, not from express undertaking, but from voluntarily assuming a relation, to which the law attaches certain liabilities. Indeed, remove the seal from the lease in question, and we have a case for assumpsit for use and occupation; replace the seal, and the action must be covenant; but the covenant in one case is as much implied as the promise in the other. In my opinion, the distinction between express

and implied covenants, when taken with a view to the question of the lessee's continued liability, has reference to the nature of the obligation assumed. For if the obligation of the defendant be merely an incident to his tenancy, which is co-eval with it, and passes with it, by assignment, then it would seem that he is holden no longer than he remains tenant; but if it be a personal contract, capable of subsisting distinct from and independent of the tenancy, then it subsists so long as the term endures. Indeed, the distinction has no sort of meaning, when applied to the subject matter of the covenant, to wit, the payment of the rent. The rent to be paid is always expressed in a formal lease, and must be, to render the reservation valid.

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It seems to me obvious that the distinction has reference to the matter of the obligation, and that, unless the lessee bind himself personally, in express terms, to the payment of the rent, his obligation is incident to his estate, and so far as it gives a personal remedy, by action of covenant, it is implied.

It was doubtless competent for the lessee to assume upon himself to pay the rent, as an enduring obligation, which might survive an assignment of his term. Whether he has done so, in any given case, is a question of intention, to be gathered from the deed. If he expressly undertake, promise or covenant to pay it, the question is at rest; but if he merely accept the lease, which reserves the rent, and has the power, by law, to assign the term, the absence of such express undertaking affords strong evidence of the intent of the parties on this point.

In this view of the subject, it is clearly incumbent on the plaintiff, to establish the personal obligation. From the nature of the covenant, growing out of the assumption of the character of tenant, depending upon that relation, and accompanying it, in case of an assignment of the term, we are inclined to consider it as not involving, necessarily, and of course, a personal liability, capable of being disconnected from the relation of landlord and tenant. If the mere acceptance of a lease upon the terms of "yielding and paying," is considered as amounting to a covenant, or if the covenant originates in such an act, it seems, that, if the relation is transferred, it is so with all its incidents; and if the lessee can divest himself of the character of tenant, he would of course clear himself of all liability incident to it. On the other hand, it is always in the power of the lessor to require a covenant, in terms for the payment of the rents, and, if such an obligation is

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intended to be assumed, words should be used clearly indicative of such intention,—such as “*covenant*,” “*agree*,” &c.

Another consideration fortifies this argument. An assignee of the term is liable to an action of covenant for the rent, in the same manner, and, I think, upon the same principle, as the original lessee. But, as to him, the covenant is implied; for it is agreed on all hands, that he is not liable after he parts with the term. If, then, this covenant is implied, as respects him, how can its nature be different, as respects the original lessee? If there be no covenant, except what is implied in the words, “yielding and paying,” I can conceive no distinction between the liabilities of successive tenants. And if the obligation be merely incident to the estate, although it may be enforced by personal action, yet, if that obligation is transferred in one case, by assignment of the term, I see not how it is not in another.

Upon the whole, we think that this covenant is to be considered an implied one, so far as respects the question between these parties, and that it does not, on the face of it, import a mere personal obligation, resting upon the defendant, upon the footing of an express contract, after his tenancy has ceased. The judgment of the County Court is, therefore, affirmed.

WINDHAM COUNTY.

FEBRUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

" STEPHEN ROYCE, } *Assistant Justices.*
" JACOB COLLAMER. }

SAMUEL ALLEN, Jr. v. JOHN P. WARREN.

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AN execution, issued by a justice of the peace, upon a judgment, in which the debt or damages do not exceed the sum of fifty three dollars, should be made returnable in sixty days, though the damages and costs, together, exceed that sum.

This was an *audita querela*, on the following complaint.

"John P. Warren is attached to answer unto the grievous complaint of Samuel Allen, jr. who complains and says, that, heretofore, on the 4th day of March, 1836, the said John P. Warren, by the consideration of Pearley Fairbank, justice of the peace for Windham county, recovered judgment, in an action on judgment, demanding sixty dollars damages, against the complainant, for the sum of fifty dollars and ten cents, damages, and three dollars and thirty seven cents, costs of suit in that behalf—as by the record of said judgment, ready to be produced in court, will fully and at large appear. And the complainant further says, that, afterwards, on the same 4th day of March, the said John P. Warren prayed out his writ of execution of said judgment, for the sums aforesaid, dated the 4th day of March, 1836, and returnable within sixty days from the date thereof, the tenor of which writ here follows, to wit—[here follows the execu-

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tion in all respects regular, except that it is returnable in sixty days.] And the complainant further says, that, afterwards, on the 5th day of March, 1836, the said John P. Warren, at Wardsboro, put the said writ into the hands of one Chandler Pratt, then a lawful deputy sheriff of Windham county, and procured the said Pratt, under color of said writ, to seize the goods and cattle of the complainant, to wit, one two-year-old colt, of the value of forty dollars, and the same convert and dispose of to the proper use of said John P. Warren, under pretence of satisfying said writ. And the complainant further says, that said writ is irregular, null and void, in this, that the same is returnable within sixty days, and not within one hundred and twenty days from the date thereof, and the said writ, for such cause, ought to be set aside vacated and holden for nought ;—and the complainant has had no day in court to plead the matter aforesaid, in avoidance of the said writ. By all which the complainant is greatly aggrieved," &c.

To this complaint the defendant demurred.

Complainant joined in demurrer.

The County Court decided that the complaint was insufficient. To this decision the complainant excepted ; and the cause passed to the Supreme Court.

R. M. Field, for the plaintiff.

I. Audita querela is the proper remedy, where an irregular execution has issued on a regular judgment.

"*Sci. fa.* recited a judgment in the time of the King, which, in truth, was in the time of the King and Queen, and so no judgment to support it. *Per Cur.* In strictness, we ought to put them to *Aud. que.* but we generally relieve on motion." 12 Mod. Rep. 355. 10 Vin. Abr. 588.

"If an execution issue irregularly on a regular judgment, and award of execution, the remedy for the party injured is, either by *audita querela*, or by motion to the court to set aside." 12 Mass. Rep. 483.

The last case was cited and approved by this court in *Hurtbut v. Mayo*, 1 D. Chip. Rep. 391.

Audita querela is necessarily the only remedy against an irregular execution of a justice of the peace for as justice courts are constituted, without stated terms or succession, relief by motion is impracticable.

II. A mistake in the return of an execution is an irregularity sufficient to avoid it. Windham,
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In *Hatch, ex parte*, 2 Aik. 28, it was decided, that an execution, made returnable in one hundred and twenty days, which should have been returnable in sixty days, was bad, and would not justify an arrest. Allen
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In *Tichout v. Cilley*, 2 Vt. Rep. 415, this court held that an execution, made returnable, by mistake, in sixty days, instead of one hundred and twenty, was voidable. Learned counsel, on both sides, considered it wholly void.

III. The execution of the judgment, set forth in the complaint, should have been made returnable in one hundred and twenty days.

The act of 1825, Sec. 3, provides that, "whenever a judgment shall be rendered for a larger sum than fifty-three dollars, in pursuance of the provisions of this act, the execution shall be made returnable in one hundred and twenty days." Stat. p. 139.

Two propositions are to be sustained by the complainant.

1. That the *judgment* was for more than fifty-three dollars.

2. That the judgment was rendered in pursuance of the provisions of the act of 1825.

1. The complainant insists that a judgment includes costs, as well as damages. The defendant, on the contrary contends, and so the County Court decided, that debt or damages alone constitute the judgment.

At common law, costs, *eo nomine*, were not recoverable, but they might be, and usually were, given by the jury, in the assessment of the damages. 3 Black. Comm. 399.

By the statute of Gloucester and other English statutes, costs were expressly given, to be recovered with the damages. *Id.* *Ibid.*

The practice of separating damages and costs was adopted, simply to avoid giving the plaintiff his costs of suit twice over, once by the assessment of the jury, and once by the taxation of the court. In their real nature, however, costs have always been considered as a part of the damages.

In the record, they are mentioned as increase of *damages*.

"Costs are, in law, so coupled together, that they are accounted parcel of the damages." 2 Inst. 288.

In *Pilfold's case*, 10 Co. 116, the word *damna* is said to in-

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clude costs under its proper and general signification; thus, there are "*damna pro injuria illata et pro expensis litis.*"

In *Phillips v. Bacon*, 9 East. 304, Lord Ellenborough said, "costs are a consequence, by the statute of Gloucester, of detaining the debt, and are a part of the damages. In contemplation of law, the word *damages* emphatically includes *costs.*"

See also, 1 Lutw. 640. Cro. Jac. 420. 2 Wils. Rep. 95.

"There can not be one judgment for debt and another for costs." Roll's Abr. 516.

In *Graham v. Benton*, 1 Wils. 41, it was decided, that the costs of a writ of error, accruing after a certificate of bankruptcy, when the judgment was before, were barred by the certificate. The reason given is, that "the costs and debt are one debt."

See also, 1 H. Black. Rep. 29. 1 W. Black. Rep. 1317. 3 M. & S. 326.

In *Weed v. Nutting*, Brayt. Rep. 28, it was held that a judgment, in which illegal costs were allowed, was irregular *in toto*. This decision stands on the good legal reason, that the debt and costs form one *entire* judgment.

The English statutes treat costs as forming a part of the judgment. Thus, the Stat. 23 H. 8 Cap. 13. 4 Jac. 1 Cap. 3. 8 & 9 W. 3 Cap. 10, provide, that, in certain cases, the party shall have "*judgment* to recover his *costs.*" The Stat. 22 & 23. Car. 2 Cap. 9, enacts, that, if too large costs, in a certain case, be given, the "*judgment shall be void.*" The Stat. 3 Jac. 1 Cap. 8 provides, that, in error, "bail shall be given to satisfy the debt, damages and *costs, adjudged* on the former *judgment.*"

Our own statutes uniformly use the word, *judgment*, to include costs, as well as damages.

At p. 216, interest is given on "*judgments,*" after sixty days. 'Twas never doubted that interest should be computed on costs, as well as damages.

At p. 135, jurisdiction is given to justices, in actions on "*judgments,*" not amounting to more than fifty-three dollars; and on "*foreign judgments,*" not surmounting thirty-three dollars. Was it ever questioned that costs here must be taken into the account in determining the jurisdiction?

At p. 145, appellant may tender the "whole amount of the *judgment,*" and plead in bar. Would it be sufficient to tender the debt or damages only?

At p. 86, Sec. 94 and p. 126, Sec. 13, "mutual *judgments*" may be offset, and execution issue for the balance. What becomes of the costs, if nothing, but mutual damages, are offset? Windham,
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At p. 61, interest on the *judgment* is given, in case of failure to prosecute a writ of error commenced. Hence, it appears, that the Legislature was not ignorant of the distinction between judgment and debt. Allen
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See also, pp. 87, Sec. 96. 151, 3 times. 72, Sec. 46. 73, Sec. 52. 66, Sec. 29.

The act of 1821 contains, within itself, evidence of the sense, in which the Legislature intended to use the term "*judgment*."

In the second proviso of Sec. 1, it became necessary to speak of debt or damages, as distinguished from costs. If the defendant's definition be correct, why was not the word *judgment* used in that proviso, instead of the periphrasis, "sum in debt or damages?"

Again, in Sec. 6, the word judgment recurs, and in a connexion, not admitting of any cavil about its signification. A defendant, appealing, is allowed to tender a confession for the "amount of said judgment." It will not be denied, that judgment, here, includes costs as well as damages. Is it not decent to presume that in the same act, (and that short and carefully penned,) the Legislature intended the *same* thing by the *same* word?

The inference is, that the costs must be reckoned with the damages, in ascertaining the amount of the judgment.

And this is reasonable and consonant to the true spirit of the act, for the design of this third Section was to favor debtors in large executions. But it is indifferent to the debtor, whether the money, to be paid, is to satisfy costs or damages.

2. The judgment was rendered in pursuance of the provisions of the act of 1825.

The complaint shows, that the damages, demanded in the action, were *sixty dollars*. A justice of the peace, by no other act, could take cognizance of such an action, or render any judgment, at all, therein. For the *ad damnum*, though not conclusive to confer jurisdiction, is conclusive to take it away. See 1 Aik. Rep. 250. 5 Vt. Rep. 124. Id. 503.

It is no answer to say, that the amount of the judgment was not beyond what a justice *might* have rendered by the act of

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1811 ; for the amount, actually recovered, is never considered in determining the jurisdiction. *Brush et al. v. Torrey*, Bray. Rep. 141.

D. Kellogg, for defendant.

I. As the *debt* or *matter* in demand, in the suit *Warren v. Allen*, did not exceed fifty-three dollars, the execution was properly made returnable in sixty days. Statute of 1811, p. 137. Statute of 1803, p. 135.

II. The justice had jurisdiction of the suit, by virtue of the the act of 1811, and did not need the aid of the act of 1821. The judgment was not rendered in pursuance of the provisions of the act of 1821.

III. The provision of the act of 1821, requiring executions, in certain cases, to be made returnable in one hundred and twenty days, applies only to that class of cases, falling within the enlarged jurisdiction, as created by the act, or, in other words, where the *debt* or *matter* in demand exceeds fifty-three dollars.

The jurisdiction of the justice is determined by the amount of the plaintiff's demand, without reference to the costs accruing in the progress of the suit.

IV. This view is conformable to the language and spirit of the statutes, and is believed to correspond with the uniform practice throughout the State.

The opinion of the court was delivered by

COLLAMER, J.—The statute of 1821, (Com. laws, p. 139) increased the jurisdiction of justices of the peace from fifty-three dollars to one hundred. This was considered a relief to debtors, in saving them cost. But as they had been previously subject to suit, on demands above fifty-three dollars, to the County Court, whose sessions were only twice in each year, and they could procure delay by reviewing their causes to the next term, when they came to be sued on such demands before a justice of the peace, they would be subject to execution, without delay. To relieve them, in some measure, from this increased dispatch, it was devised to have executions with a longer life. It was then, for the first time, that an execution for one hundred and twenty days was provided for. From this view, the mind is naturally led to expect, that the new execution would be provided only for the cases, that were now newly included in the justice jurisdiction ; granting this delay to those who had delay,

in another way, before. In the third section, it is provided, "that whenever a judgment shall be rendered for a larger sum than fifty-three dollars, *in pursuance of the provisions of this act*, the execution shall be made returnable within one hundred and twenty days; any former act to the contrary notwithstanding." The *judgment*, then, must not only exceed fifty-three dollars, but it must have been rendered *pursuant to the provisions* of this act, increasing the jurisdiction above fifty-three dollars. The judgment, in this case, including costs, was over fifty-three dollars, but the *debt or damages* was under that sum. It was a judgment rendered in an action on judgment. Was it in pursuance of this act, or was the judgment such a one, as the justice might have rendered, without this act? We think he might have rendered such a *judgment*, without this act, and, therefore, the execution might issue for sixty days. But a further examination of this statute seems more clearly to settle this question. By the previous laws, where the body was taken on *mesne process*, and bail procured, in order to hold the bail, execution must be given out in thirty days, and delivered to the proper officer, and a return of *non est inventus* made, within sixty days from the judgment. To leave this law in force, would, in a great measure, frustrate the delay, intended by the one hundred and twenty day executions. In making provision for this, it became again necessary to speak of, and more distinctly define, in what cases such executions should issue, how they should be executed, and the effect on bail. All this is done in the fourth section. The last sentence, in that section, is as follows: "and no bail shall be discharged, because a *non est inventus* return is made in sixty days, in any case, where final judgment is rendered by a justice of the peace, and where the judgment shall exceed the sum of fifty-three dollars, *in debt or damages*." This renders it perfectly certain, that it was in those cases only, where the *debt or damages, recovered*, exceed fifty-three dollars, was the execution to run one hundred and twenty days.

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Judgment Affirmed.

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JOHN BLANDIN & SAMUEL STEBBINS, heirs of JOHN BLANDIN, deceased, appellants, v. SALLY BLANDIN, Executrix of the will of J. BLANDIN deceased, appellee.

The purchase, after the execution of a will, of land, which would be included in the general description of the land devised by the will, is no revocation of the will, in whole or in part.

This was an appeal from a decree of the Probate Court, approving the will of John Blandin, deceased. The case will appear from the opinion of the Court, delivered by

COLLAMER, J. The last will and testament of Blandin devises his whole home farm. It gives the use of it to the widow, to support her and the two youngest sons, until they become of age, and then one half to be disposed of in paying certain pecuniary legacies to other children, including John, the present appellant, and the other half for the two youngest sons.

Among several pleas, now filed by the appellants, showing why said will ought not to be approved, the third alleged, in substance, as follows: That, at the time of the making of said will, the fee of one half of said farm, was in John Blandin, Jr., who afterwards conveyed the same to the testator, and the plea concludes, that, thereby, the will was revoked. To this plea there is a demurrer and joinder.

In the case of *Graves and Others v. Sheldon*, 2 D. Chip. R. 71., the doctrine of implied revocations, or revocations at law, is examined by the court, and this conclusion deduced; that, in this state, and under our statute, no will can be revoked, in whole or in part, but in the way pointed out by the statute, except from the necessity of the case. That is, when the testator has aliened the devised estate, and there is nothing for it to operate upon, in so far, it is revoked.

In the present case, the deviser sold some of the land devised, and it is obvious that, in purchasing more land, no necessity arises for revocation. This will merely raise a question of what portion of the land will pass by the will, after it shall be approved, but constitutes no objection to its being approved. It is believed that no case can be found of a revocation of a will being produced by new purchases.

It is, however, insisted, that, inasmuch as this deed was from John, Jr., an heir at law, it altered the condition of the property, the heirs and legatees. The new condition of heirs or of lega-

tees is not, even at common law, ground for an implied revocation. Nothing, short of an essential change in the condition of the deviser, will effect this. It is not, however, apparent from the plea, that the condition of John Jr. or his property, was changed. Had the plea alleged that John, Jr. held one half this farm, as advancement from his father, and, after the execution of the will, surrendered it, that would have shown change; but, as it now stands, it merely shows that the testator *purchased* of his son that half of the farm, the same as from a stranger. We do not see how this purchase could be any revocation of the will, even at common law; as it is, in no way, inconsistent with the will. Indeed, when we find a man devising land which he does not own, and then proceeding immediately to purchase that same land, and leave his will unaltered, and dying seized of the same, it seems so far from a revocation, as to be taking direct measures to set up and perfect the devise, to give it full operation, and to manifest an *intention*, which is the great point to be looked to in the common law doctrine of implied revocation. It is, however, not necessary now to decide what land will pass by this devise.

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Sally Blandin

Judgment that the third plea is insufficient.

Wm. C. Bradley, for the appellants.

R. M. Field, for the Executrix.

CYRUS WASHBURN, Executor of APOLLOS CLAPP, v. THOMAS
W. TITUS.

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February,
1837.

(*In Chancery.*)

The testator conveyed to defendant a farm and took back a bond and mortgage. The executor brought a bill to compel a performance of the bond, according to the construction claimed by him. The answer stated the bond and mortgage and claimed that the defendant had performed the condition thereof.

Held, that the construction to be given to the bond, as well as, whether the same had been performed, were questions to be tried in the courts of law; that the remedy of the orator was wholly at law, and the bill was dismissed without prejudice, but with cost.

On the 20th December, 1834, the orator's intestate conveyed his farm, in Vernon, to the defendant, for the consideration, as stated in the deed, of \$1700. The defendant, on the same

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day, executed to the intestate a bond, in the penal sum of \$2500, conditioned, as follows, viz—"that, whereas, the above named Appollos Clapp has this day deeded his farm, lying in said Vernon, containing one hundred and twenty acres more or less, for the consideration of seventeen hundred dollars, for the support and maintenance of the said Appollos, to Thomas W. Titus, who has agreed to support and maintain the said Apollos, to the extent of said means and sum, and the interest accruing on the same ;—

Now, if the said Thomas W. Titus shall well and truly maintain and support the said Appollos Clapp, on the said place in Vernon, or at such other place as the said Appollos and Thomas W. may agree upon, in sickness and in health, from this time forth, during his natural life, and shall, at all times, deport himself tenderly and respectfully towards the said Appollos, and shall furnish and supply him at all times, with good and sufficient food, apparel, medicine, fire, lodging, room and every thing proper and comfortable, according to his condition and situation, and shall furnish him, from time to time, with all necessary, proper and convenient money for his own benefit, use and expenditure, until the whole amount of the consideration, and amount of seventeen hundred dollars aforesaid, with the interest yearly accruing on the same, shall be fairly expended, as aforesaid, in said Appollos' support, then this obligation to be void, otherwise to remain in full force and virtue.

THOMAS W. TITUS, [L. S.]

To secure the performance of the condition of the bond, the defendant, on the same day, executed a mortgage deed of the premises in question to the intestate, the proviso of which deed was as follows, to wit—"if I, the said Thomas W. Titus, my heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid Appollos Clapp, and furnished and provided for him, his heirs, executors or assigns the maintenance and support of the said Appollos Clapp, from the date of this instrument, during his natural life, or till the whole of the above consideration and amount of seventeen hundred dollars, and the interest accruing thereon, shall be fairly expended in his support ; and shall furnish and supply him, the said Appollos Clapp, at all times, with good and sufficient food, apparel, medicine, firewood, room and every thing proper and comfortable, according to his condition and situation, and shall furnish him, from time to

time, with all necessary, proper and convenient money, for his own benefit, use and expenditure, until the whole amount of seventeen hundred dollars, as aforesaid, with the interest yearly accruing on the same, shall be fairly expended, as aforesaid, in said Appollos' support, according to the tenor and effect of my bond, bearing even date with these presents, and duly executed and delivered to the said Appollos, then, this deed to be void, otherwise in full force and effect."

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The other facts in the case sufficiently appear from the opinion of the Court, delivered by

WILLIAMS, CHAN.—The bill states that the testator, Clapp, was afflicted with the delirium tremens, and became debilitated so as to be unable to carry on and manage his farm; and that, on the 1st December, 1833, he leased it to the defendant, to receive his support by way of rent; that on the 20th December, 1834, the defendant persuaded and induced the orator to sell and convey the farm to him for the sum of \$1700, on credit, and, that defendant agreed to pay said sum of \$1700; that on the 28th October, 1835, the testator died, and the orator was appointed executor; and praying that defendant may be decreed to pay the sum of \$1700, deducting what he has expended in the support of the testator.

The answer sets forth the contract, by which it appears that, at the time of executing the deed, the defendant, Titus, executed a bond and mortgage, which are stated in the answer.

The testimony does not warrant the allegation, that any means were made use of to persuade or induce the testator to make the contract, or execute the deed; nor is there any evidence that the mind of the testator was weak, or that his faculties were impaired by age or disease. On the contrary, he appears to have been a man about middle age, peaceable in his behavior, and, for aught that appears, as capable as he ever was, of disposing of his estate, making any contracts or managing his affairs; but that he was addicted to intemperance. Nothing appears, but that he fully understood the nature, extent and consequences of the the contract he did make with the defendant. He frequently expressed himself satisfied with the manner, in which he was treated by the defendant. There is nothing in the contract itself, which a man, in the exercise of his faculties, might not make, or, in other words, an intelligent man might make such a contract as the defendant contends was made by the testator, as well as such an one as the orator contends for. If the contract

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was for his support, it would have been singular if he had inserted a provision as to his funeral expenses, the omission of which has been argued as evidence of his incapacity. Surely, no man, who was investing a sum of money to be expended for his support and maintainance, and which he contemplated might be exhausted, in that way, before his death, would insert a provision, that a certain part of that sum should be reserved for the purpose of his burial; the testator, much more rationally, in his will, provided for the paying of those expenses, from his personal property, out of the legacies therein given. We should not be warranted, therefore, in this case, from the testimony, in rescinding the contract, upon any of the grounds mentioned, if the prayer of the bill had been framed for that purpose.

We must, then, turn our attention to the contract, as contained in the bond and mortgage, learn what it is, and whether the orator is entitled to the relief prayed for, or to any other relief, under the general prayer.

In the first place, it may be remarked, that the bill sets forth no trust, either express or resulting. In framing the bill, the orator could not have had in view a trust arising by operation of law, on the bond and mortgage, as neither of them are noticed in the bill. Possibly, however, if the papers, produced, established a trust, we might so consider it, and decree accordingly. The construction, to be placed on the contract, is to be learned from the writings executed, and not from any parol testimony. The parol testimony, however, does not disclose any thing different from what the writings themselves purport to be. As the orator has not insisted on any trust in the bill, neither can we discover, from the testimony, any trust, which calls for the aid of a court of chancery to enforce, or carry it into effect. The testator executed a deed. The defendant executed a bond and a mortgage, to secure the performance of the conditions of the bond. The bond and mortgage were the consideration of the deed. The land was conveyed by the deed, and the testator took such a bond and mortgage as he thought proper, and with such conditions as he thought would secure the performance of the contract made between them.

Whether, therefore, the defendant was to pay \$1700, for the farm, at all events, or whether the condition was performed, when he supported the testator, in the manner therein prescribed, until his death, or whether his obligation is to pay any thing further,

are wholly questions of law, arising upon the construction to be placed on the bond and mortgage.

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In this view of the case, we can see no reason for the interposition of the powers of a court of chancery. The remedy of the orator, if he has any, is upon the bond and mortgage. We cannot vary the terms of the condition, or make any new one. If the construction is as contended by the orator, he may sue at law, either upon the bond, or by action of ejectment to recover the premises mortgaged, or he may come into chancery to foreclose his mortgage. At any rate, he cannot call upon the court of chancery, in this suit, to put a construction upon that bond; and decree a payment of the same. On the other hand, if the construction is as contended for by the defendant, it will furnish a good defence to any action, which the orator may institute, either upon the bond or mortgage. As we consider the orator not entitled to enforce this contract or bond in a court of chancery, the result is, that the bill must be dismissed with cost, but without prejudice.

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Keyes & Bradley, Solicitors for orators.

J. Phelps & Daniel Kellogg, Solicitors for defendants.

WINDSOR COUNTY.

FEBRUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " STEPHEN ROYCE,
 " JACOB COLLAMER, } *Assistant Justices.*
 " ISAAC F. REDFIELD,

EBENEZER PIERCE v. LUTHER GILSON.

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Action of trover may be maintained by the maker of a note, which has been paid and left, by mistake, in the hands of the holder.

But such action cannot be maintained, when the fact of payment is denied by the holder.

Testimony may be given to shew that a violent quarrel existed between the party and a witness, introduced against him, without enquiring of the witness as to the quarrel.

This was an action of trover for the conversion of a note, which, the plaintiff alleged that he executed to the defendant, and subsequently paid, and left in the hands of the defendant, who refused to deliver it to the plaintiff, on request.

The defendant pleaded the general issue, and introduced testimony tending to prove that he executed the note in question, and that he afterwards paid the full amount due on it, to the defendant, and, by mistake, left the note in defendant's possession; that he afterwards called on the defendant for it, who declined to give it up, claiming that it was not paid, and threatened to commence a suit upon it. The plaintiff, also, introduced testi-

mony, tending to prove that the last sum of money, paid by him, and which completed the payment of the note, was not indorsed on the note, and that the name of the plaintiff was not erased from the note, nor in way obliterated therefrom.

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The defendant insisted that the plaintiff, upon this evidence, was not entitled to go to the jury; that, if the evidence was believed, it was not sufficient in law to entitle him to recover, and moved the court for a nonsuit.

But the court overruled the motion, and decided that if the jury believed the testimony, the plaintiff had made such a case, as entitled him to recover.

The defendant then introduced testimony tending to contradict one of the witnesses, introduced on the part of the plaintiff, and the principal one, by whom the note in question was identified, as the one paid, and offered to prove that a violent quarrel existed between said witness and the defendant. But the court excluded the testimony, on the ground, that the question must first be put to the witness himself.

The defendant requested the court to charge the jury, that the testimony disclosed no act of the defendant, amounting to a conversion of the note. But the court declined so to charge the jury, but instructed them, that, if they believed that the note, in question, had been paid and left in the hands of the defendant, by mistake, and if they should find that the plaintiff did demand the note of the defendant, and the latter refused to give it up to the plaintiff, it was such evidence of conversion, as entitled the plaintiff to recover. The jury returned a verdict for the plaintiff.

The defendant excepted, and, also, moved in arrest of judgment, for the insufficiency of the declaration. This motion was overruled by the County Court, and the case came up to this court for revision.

A. Tracy, for defendant.

The County Court erred in excluding the testimony offered by defendant, to prove the existence of a violent quarrel between one of the plaintiff's witnesses and himself, on the ground that the question must first be put to the witness himself.

It is admitted that such is the rule where the attempt is to discredit a witness by proof that he has said that, which is inconsistent with his testimony on the stand.

But the cases are not analogous. In the case now under consideration, the inquiry is as to a collateral and independent fact,

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and the party, making it, is bound by the answer, if put to the witness himself. In the other, it is strictly in point, as matter of cross examination, and hence the party, making it, is not concluded by the answer, but may still show the fact by other testimony.

It is believed that no authority can be found sustaining the decision of the county court. The authority of judge Swift is directly against it. Swift's evidence, 148.

It may perhaps be said, that, admitting there was error in this, the testimony excluded was not of a character sufficiently important to warrant a new trial. But the case shows the witness, sought to be discredited, to have been a material witness, and that he was contradicted by other testimony. And this court will not undertake to say how far the testimony excluded might, when added to the other testimony, have gone to convince the jury that his story was not to be believed. If the testimony was legal, the defendant had a right to have it weighed by the jury.

But the view the court may take of this question is of little importance in the present case, if the motion in arrest prevails, and we think it must, for the want of any sufficient cause of action set forth in the declaration.

That trover cannot be maintained for a note, which has been paid, and left in the hands of the payee, is believed to be well settled by the case of *Todd v. Crookshanks*, 3 Johns. Rep. 432.

The action of trover is founded on property, and cannot be sustained for that, which is utterly valueless, and which cannot be considered as property in any sense; and such, by the plaintiff's own showing, was the character of the note sued for—mere waste paper.

It cannot be sustained for the purpose of creating a defence to an action, that may, or may not, thereafter be brought.

The present action was brought, not for the purpose of recovering five cents, or any other sum, but for the purpose of creating a record, which shall operate as a bar to any future action on the note.

Nominal damages, only, were or could be claimed, and it will not be pretended that a note, which has been fully paid, has any property or value in it, which can be the subject of proof or estimation.

If the declaration, then, can be sustained, it is on the ground that trover may be sustained for that, which is, in itself, utterly valueless, with a view to protect the party from a future action for the same cause. In other words, it may be sustained, not to recover the value of property converted, but for the sole purpose of creating evidence in relation to it. And, for such purpose, it is believed no authority can be found sustaining it.

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Admit the principle, that trover may be sustained for a paid note in the hands of the payee, and it follows that justices of the peace have unlimited jurisdiction in relation to notes of hand. The damages, in such cases, are necessarily nominal, and the maker of a note of \$500, or any other sum, may set up payment, bring his action of trover for the note, before a justice of the peace, setting his damages at five or ten cents, and if he can succeed in getting a judgment, the note is forever barred.

But it is said, in the present case, that the final payment is not indorsed on the note, and that the plaintiff's name is not erased or obliterated. If either had been done, it will not be pretended that the action could have been sustained.

Can this, however, difference the case? It is only another form of the evidence, and can the right of action depend upon the mere form of the evidence? It is true, the evidence in this case did not exist in either of these forms, but it existed in some form, or the plaintiff could not have obtained a verdict, and the mere form of the evidence certainly cannot vary the principle.

The case of *Todd v. Crookshanks* is believed to be the only case, that can be found, that is directly in point. But the plaintiff relies very much upon the case of *Buck v. Kent*, 3 Vt. Rep. 99. But that case, as well as the cases there cited, is believed to rest on very different principles. The action, in that case, was not brought to try the question of payment, but it was to recover substantial damages for an injury, occasioned to the plaintiff, by the wrongful conversion of the note. The note had been disposed of by the defendant, in violation of his agreement, and for a valuable consideration, and the plaintiff had paid the full amount of it. He was then most manifestly entitled to the amount he had paid. No such facts exist in this case. So, too, in the cases cited from 6 Mass., 2 Bos. & Pull., and 10 Johns. Rep., the facts are different from the present case, and so, upon examination, will it be found with all the other cases. And, in no one instance, can a case be found, it is believed,

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where the action has been sustained upon grounds such as exist in the present case.

C. Coolidge, for plaintiff.

The plaintiff, as the maker of the note in question, had always, from the moment he made it, the *general* property in it; and, on the instant of its being paid, his right to the possession of it accrued.

I. Because, though paid, the note was on the face of it evidence of a debt, and was, therefore, susceptible of being used to his prejudice. He was, also, entitled to it as being, in his possession, *prima facie* evidence that he had paid it. It would constitute a means of defence. That the note was of no value to the defendant, does not affect the question. It was of value to him, who made it and had paid it. The case shows that the plaintiff's name was still on the note, and in no way obliterated.

II. So universal is the practice of surrendering paid notes, it may well be considered as implied in every case of giving a note, that, whenever the maker shall pay it, he will be entitled to have it given up to him; and, perhaps, no stronger proof of the universality of this usage can be afforded, than is afforded by the fact, that hardly a case is to be found in the books, in which the question has directly arisen.

III. The right claimed by the plaintiff is well grounded upon authority. See Starkie Ev. 1503. 18 Com. Law Rep. 146. 3 Johns. cases, 243. 3 Vt. Rep. 99.

As to the refusal of the court to permit evidence, by others, to be given to a quarrel existing between the plaintiff's witness and the defendant, it is insisted that, when the witness may be contradicted by other evidence, if he deny the particular fact, the law requires that the witness himself be *first* inquired of, as to the fact. 3 Starkie Ev. 1741, 1753,-4,-5.

The opinion of the court was delivered by

WILLIAMS, Ch. J. That an action of *trover* may be maintained for a written security, is too well settled to admit of dispute. A paper, whether it be a lease, deed, note, or bill of exchange, is but evidence of a title, or of a contract; and, if lost or wantonly destroyed, the title or the debt is not thereby destroyed. The same objection, which has been insisted on here, might be urged as an objection to any action of *trover* for a written security, viz. that the same evidence, which would maintain the action, would supply the want of the paper, whenever it should

become a subject of controversy. As evidence, such papers have a value attached to them, and, therefore, whoever illegally withholds them from him, who is entitled to the same, is liable to an action of trover. A note is evidence of a sum of money due from the maker, and, as such, is of value to the holder, and because it is such evidence, it is of value to the maker to have it in possession, or cancelled, when he has paid the same, either as evidence of his having made the payment, or to suppress an evidence of his indebtedness, which ought not to exist. To compel a person to deliver up papers to be cancelled, which would otherwise be evidence of their contents, but which ought not to be held for that purpose, is frequently asked for and ordered in chancery. Suits in chancery, and writs of *audita querela*, may be instituted, *quia timet*, when the same evidence, which would sustain the bill or suit, if it could always be preserved, would prevent the fears from ever being realized.

The right of the person, who has paid a note, to have it delivered up to him, was recognized in the case of *Eastman v. Potter*, 4 Vt. Rep. 313, and in several cases there referred to. The very question, whether an action of *trover* can be maintained, for a note paid, at the suit of the person making the payment, has been settled by authority. The cases, mentioned in 3 Starkie, 1503, as well as the decision in the case of *Buck v. Kent*, 3 Vt. Rep. 99, are decisive that such an action may be maintained. The case from 3 Johns. 432, is the only one conflicting with this principle. But while such an action is recognised, it should be so guarded as to prevent either inconvenience or injustice. It will not answer to permit a litigated question of payment to be decided in such an action. The action should be permitted only where, not only the evidence of payment is unequivocal, but also where it was understood by both parties. As long as that subject is in dispute, and while the holder of the note claims that it is not fully paid, he has a right to retain the note as evidence of indebtedness. In this case, the evidence introduced tended to show that the note was paid and left, by mistake, in the hands of the defendant. If such were the facts, the plaintiff was entitled to the note. But, if, at the time the plaintiff paid the note, as he contends, the defendant insisted that something further was due, although he may have been under a wrong impression as to that fact, he could safely insist upon retaining the same, until the question of payment was settled.

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On the other question, we recognize the rule, that whenever the credit of a witness is to be impeached, by proof of what he has said, declared, or done, he is first to be asked, upon cross-examination, whether he has said, or declared, or done that, which is to be proved, and we think it not only a satisfactory one, but one, which must be observed. And the application of this rule would, in many cases, require, that the witness should be inquired of, on cross-examination, in relation to controversies. Yet there are other cases of quarrels between a witness and party, where such an examination could not be necessary. A party has a right to have the jury know if there is any hostility or bad feeling existing between the witness and him, at the time of his testifying. For that purpose, it may be shewn that a law suit has existed, calculated to excite personal dislike; that a violent altercation has taken place, arising to personal violence. We can see no reason why, in some such cases, the inquiry should be first made of the witness. The aggression may have been on the part of the party, and not of the witness. The witness may think that he entertains no ill will towards the party. The fact of the controversy is all, which is to be shewn; but the nature of the quarrel is not to be explained. In the case before us, the defendant gave evidence, tending to contradict one of the witnesses introduced on the part of the plaintiff, and then offered to prove, that a violent quarrel existed between the witness and the defendant. What the nature of the quarrel was, is not stated. We think this testimony was proper, and we cannot see why it was incumbent on the plaintiff either to prove, or attempt to prove this, by cross examination of the witness. It was a distinct, collateral fact, not directly to impeach the witness, but to shew his feelings towards the party, and of the same character, as shewing the relationship, or connection between the witness and the party producing him. As the quarrel may have been of a nature, which did not require that the witness should be first inquired of, on cross examination, we think the county court erred in excluding the testimony offered.

Judgment reversed.

LUTHER FOOT v. BENJAMIN MAXHAM & ELKANAH MAXHAM.

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L. deeded to M. a tract of land, subject to a lease, which, as to one part, expired 1st February, and the residue, 1st May, and also subject to a mortgage to one D. of about \$700,00, and covenanted that the mortgage should be discharged before the expiration of the lease; or that M. should not be obliged to make any further payments on the notes given to secure the purchase money. \$306,00 of the purchase money was paid when the deed was given. In an action on one of the notes; held, that the ambiguity arose from the testimony, shewing the payment of the \$300,00; that the parties intended by the terms, "expiration of the lease," the time when it first expired as to part, viz. 1st of May, and that the failure of L. to discharge the mortgage to D. before that time, operated as a release of all the notes given for the purchase money.

This was an action on note, dated, March 17, 1834, for three hundred dollars, payable in one year, to William Lewis or bearer, and indorsed to plaintiff.

Plea—non assumpsit, with notice of special matter.

On the trial of the said issue, by the jury, the plaintiff read, in evidence, the note described in the declaration, with the indorsement thereof, the execution being conceded.

"The defendants gave evidence to prove, that on the 17th day of March, 1834, they purchased of said William Lewis, certain land in Sherburne, and paid therefor, in money, three hundred dollars, and gave five notes of hand, of which the present was the one first falling due, and, as a part of said contract, the sealed instrument herein after mentioned, was executed and delivered, between said parties. The defendants gave further evidence, tending to show, that the mortgage to Dain, mentioned in said instrument, was yet outstanding, an incumbrance on said land, the said Lewis not having procured the same to be discharged, nor obtained any quit-claim of the same. The sealed instrument above mentioned, was as follows,—

"This agreement, made and entered into, this 17th day of March, A. D. 1834, by and between William Lewis, Jr. of Woodstock, in the county of Windsor, of the one part, and Benjamin Maxham and Elkanah Maxham, both of Bridgewater, in the same Windsor county, of the other part witnesseth;—

"That whereas the said Lewis, of the first part, hath this day deeded to the said Benjamin and Elkanah Maxham, a certain parcel of land, in Sherburne, in the county of Rutland, containing about fifty acres of land, by deed of warranty, and

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of
Maxham.

"whereas, one Aaron Colton, of the said Sherburne, has heretofore taken a lease of the same premises, of the said Lewis, which lease will expire, on the mill part of said premises, on the first day of February, 1835, and on the residue, on the first day of May, A. D. 1835, and whereas, the said Lewis, on the 4th day of February, A. D. 1831, executed a deed of mortgage, of the said premises, to one Oxenbridge Dain, for \$704.41, which said mortgage to said Dain is yet undischarged;—Now, the said Benjamin and Elkanah hereby agree to and with the said Lewis, not to take possession, under their said deed from the said Lewis, until the time the lease of the said Colton, from the said Lewis, shall expire according to the terms thereof—and the said Lewis doth hereby agree to and with the said Benjamin and Elkanah, their heirs and assigns, that his said mortgage deed, to said Dain, shall be discharged of record, or procure a deed of quit-claim from the said Dain to said Benjamin and Elkanah, previous to the time of the expiration of the said lease to the said Colton, from the said Lewis, or that, in case it is not, the said Benjamin and Elkanah shall not be obligated or holden to make any further payments on the notes given to secure the purchase money of the said premises, so deeded to them, by the said Lewis."

In testimony whereof, &c.

(Signed)

WILLIAM LEWIS, Jr. Seal.

BENJ. MAXHAM. Seal.

ELKANAH MAXHAM. Seal.

The plaintiff requested the court to charge the jury that, notwithstanding this shewing, the plaintiff was entitled to recover. The court declined so to charge, but instructed the jury that, if they found the execution of the note on the occasion, and for the consideration aforesaid, the execution of said sealed writing being conceded, and found the Dain mortgage not released or any quit-claim thereof, they would find a verdict for the defendants. The jury returned a verdict for defendants, and the plaintiff excepted.

Aikens & Edgerton, for the plaintiff.

The note, in question, fell due on the 17th March, 1835; about six weeks prior to the expiration of the time given Lewis, by the terms of the agreement, to remove the incumbrance of

the mortgage. The other notes falling due in successive years thereafter.

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The notes and the agreement are, in effect, parts of the same contract, by which the defendants assumed to pay Lewis \$300, on the 17th day of March, 1835—\$300, on the 17th March, 1836, \$150, on the 17th March, 1837, and the balance on the 17th March, 1838, leaving Lewis his election, either to procure a discharge of the mortgage to Dain, prior to the 1st day of May, 1835, or waive all "*further payments*" of the aforesaid sums;—or, in other words, the defendants assumed, unconditionally, to pay \$300, on the 17th March, 1835, and, unless Lewis procured a discharge of the mortgage, by the first day of May, thereafter, they were to be freed from the "*further*" or remaining payments.

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The law will *not presume* that the parties contemplated a failure or neglect of the defendants to pay their notes *at maturity*, till they had some *legal right* to withhold such payment. *Such* right could only accrue to them upon the event of Lewis' failure to redeem, or rather his making *his election not to redeem* the premises from the balance of the Dain mortgage, which event could not happen until the last day of April, 1835, six weeks and more *after* the note, in question, became due.

The failure of Lewis to redeem the Dain mortgage is made, by the agreement of the parties, to operate as a *release* of the notes, contemplated to be unpaid at the time of such failure, in the nature of *stipulated damages*, for leaving the incumbrance to be removed at the expense of the defendants.

To say that such failure, or election, should also operate as a forfeiture of *other moneys*, due *before* the failure, and contemplated to have been already paid, and which *would have been paid*, but for a breach, by the defendants, of *their* contract to pay on the 17th March, 1835, would be to reward them for their breach of contract, by increasing the plaintiff's forfeiture, *far beyond* what the parties stipulated in the contract.

Marsh & Williams, for defendant.

The difficulty arises from the circumstance, that the note, by the terms of it, became payable before the conditions, specified in the articles, were to be performed, and from the expression in the articles, "the said Benjamin and Elkanah shall not be obligated or holden to make any *further payment* on the notes given for the security of the purchase money," &c.

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The power of the payee to control or postpone the payment of a note, already due or becoming due at a future day, by such an instrument as the articles, cannot be disputed. Indeed, the payee may covenant never to sue, which may be pleaded and will operate as a perpetual bar, and this, alike, whether the note is now due, or falls due at a subsequent period.

And such a covenant, made while the note remains in the hands of the payee, is, by the law then in force, equally imperative on the indorsee as on the payee.

The question rather is, what was the intention and understanding of the parties at the time?

The meaning of the parties cannot be ascertained from the contract itself, but, as in other cases, recourse must be had to other papers executed, and perhaps to other facts happening contemporaneously with the contract—This is more evident, as the contract refers to other papers, executed at the same time, without describing them sufficiently.

In cases of doubt, the instrument is to be construed most strongly against the covenantor.

This being a latent ambiguity, must be explained by testimony. 10 Mass. Rep. 459 & 379.

The case states that there was proof, that the mortgage to Dain, mentioned in the contract, was still undischarged on the record, and that no deed had been procured from him to the defendants—that the note, in suit, was one of the notes given for the purchase money of the land, to which the contract relates, and that the sum of three hundred dollars was paid down, at the time of the purchase.

Now the court may well believe that the expression, "*further payments*," refers to the money then advanced.

Indeed, the case admits of no other construction. Nothing is said in the instrument about any payment having been made by the defendants, and yet, the word, *further*, clearly refers to some payment, then already made, on the execution of the deeds. The case would then shew that all the notes, given for the land, were included in the contract.

Nothing appears but that the contract was to be at an end, in case the Dain mortgage was not redeemed by Lewis, by the time stipulated; at any rate, the defendants were not bound to

take the land and might abandon the purchase, by forfeiting the payment already made, which was a sufficient forfeiture.

The court may reject the word *further*. It will then read, "no payment on the notes," &c. 7 Vt. Rep. 104.

This construction is strengthened by the fact, that the money and four years interest on the Dain mortgage nearly correspond with the balance due of the purchase money, deducting \$300, paid down. It corresponds, also, with the equity of the case.

But the construction, contended for by the plaintiff, will require the court to interpolate a whole sentence, viz—"further than the note, which falls due before the condition is to be performed."

In *Jackson v. Hudson*, 8 Johns. Rep. 375, 387, it is said, where a deed may enure several ways, the grantee shall have his election which way to take it.

In *Jackson v. Myers*, 3 Johns. Rep. 388, 95, the intent, when apparent, and not repugnant to any rule of law, will control technical terms—the intent, and not the words, is the essence of every contract.

In *Jackson v. Gardner*, 8 Johns. Rep. 394, 406,—that exceptions in a deed, and every uncertainty, are to be taken favorably to the grantee.

In *Keisselbrack v. Livingston*, 4 Johns. Rep. 144, 146, it is said, parol proof is admissible when the contract, in the first instance, is imperfect, without referring to facts *aliunde*, even to correct a mistake in the contract itself.

In *Souwerbye v. Arden*, 1 Johns. Rep. 251, 252, a declaration, made at the time of delivery, as to the intent of the parties, may govern the deed.

Parol evidence may be admitted, that words, taken down in writing, were contrary to the concurrent intention of the parties. 1 Madd. Ch. 60.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—It is to be regretted that the parties to the sealed instrument, dated the 17th day of March, 1834, were not more explicit. By a very trifling alteration in the phraseology, the contract would have been such an one as the plaintiff contends for. An omission of a single word would have placed it beyond a doubt, that the parties intended what the defendant now claims they did. By adding after the word "notes," "thereafter due or payable," the plaintiff could have

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insisted, without any fear of contradiction, that no other notes were intended to be released, than those which fell due after the expiration of the lease ; and by omitting the word "further," there could have been as little question, that all the notes, executed to secure the purchase money, were intended. We are required, however, to put a construction on this contract, as it appears from the case, as presented ; and we are, by no means, certain, that the introduction of other evidence might not have warranted a different construction. By the introduction of other evidence, it is not meant that evidence of the declarations of the contracting parties, as to their intent, would have been received. But, possibly, other facts may have existed, which would tend, at least, to shew to what the parties had reference, by the terms made use of. Very possibly, the powers of a court of chancery might be successfully exercised, in bringing about a different result from the one, to which we arrive, from our present views of the contract. In short, we are far from feeling any degree of certainty, that a decision, either way, of the case before us, may not manifestly be unjust and inequitable, as to the parties.

The doubt or ambiguity, in this case, arises from [the use of the term "*further*," connected with the term "*payments*," which Lewis covenanted the defendants should not be holden to make, or in other words, which he released, in case he neglected or refused to procure a discharge of the Dain mortgage by the time stipulated. The agreement itself does not mention that any payments had been made, either towards the purchase money, or on the notes. Indeed, no payments could have been made on the notes, as they were executed at the same time with the agreement. If the note, declared on, had been the only one given for the purchase money, there could have been no question, but that the agreement referred to that note, and the term "*further*" must have been rejected as superfluous, whether the note was payable before or after the expiration of the lease. If the note sued, together with the other note of \$300, payable at the same time, had been the only two notes, given for the purchase money, the same consequence would have followed. The doubt, then, arises from the introduction of the other evidence ; to wit, the mortgage, by which it appears that there were still three other notes of \$375, payable after the lease had wholly expired. The ambiguity, therefore, in this in-

stance, arises from the introduction of extraneous evidence, rather than from the instrument itself. What, then, are we to suppose, was the intention of the parties to this instrument, taking into consideration their situation at the time, having reference to the facts, which were then before them? On the one hand, it seems difficult to suppose, that they could have intended that notes, payable before the expiration of the lease, would not be paid at maturity; and on the other, it is equally difficult to believe, that the defendants would, in addition to the three hundred dollars, paid at the time of the execution of the contract, have also undertaken to pay the two notes of three hundred dollars each, making in all \$900, and have retained only \$375, to pay the Dain mortgage, which was stated at \$604.41, and, with the interest, would have amounted to about \$870; and to have permitted them to retain the sum of \$975, for the payment of \$870, would, to say the least, have given them a good bargain. If there had been no more than from \$300, to \$400, due on the Dain mortgage, and that so understood by all the parties at the time, then it would have been rational and consistent that the agreement should have been for the defendants to pay the two \$300 notes, and the residue left to meet the contingency of Lewis failing to pay the mortgage; and such, probably, we should have considered they intended by their contract. But this does not appear to have been the case, and the Dain mortgage, so far as we can learn from the agreement, amounted to the sum of \$870, as before mentioned.

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The parties, understanding that the sum was due, may be supposed, by the expression "further payments," to refer to the payments already advanced, to wit, the \$300, paid at the time of the execution of the contract, rather than to any payments, which would thereafter be made of the notes executed and to fall due thereafter. Further, it is susceptible of doubt, to what period the parties referred, as the time of the expiration of the lease. By a very critical exposition or construction of the words, the lease would not expire until all the premises were freed from the lease.

The agreement states, that Colton had taken a lease, which "*will expire, on the mill part of said premises, on the first of February, 1835, and on the residue, on the first day of May, 1835.*" In another part it says, that the said Benjamin and Elkanah, the defendants, shall not take possession under the deed from said

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Lewis, "until the time the *lease of the said Colton*, from the said Lewis, shall expire, according to the terms thereof." The parties in the agreement, then, evidently considered and speak of the lease as expiring, as well on the first of February as the first of May; one part on the first of February, and the other on the first of May. It may, therefore, be considered, as the other papers and circumstances, which were in proof, would render it highly probable and equitable that it should have been so, that the parties intended the Dain mortgage should be extinguished and discharged before the defendants were to enter into possession, and that they intended by the term "*expiration of the lease*," the time when it expired as to the mill, and when the defendants were to go into possession of that part of the premises. This construction seems to be required, in order to do justice to the parties to the contract, and render the whole contract not only just and equitable, but remove any ambiguities in the other language made use of. None of the notes would then have been due, before Lewis was to have procured a discharge of the mortgage. The words "further payments" would then evidently refer to the payments already made, or be rejected, and it would have been optional with Lewis, either to have paid the Dain mortgage, which, with the interest, would have amounted to about \$875, when the defendants notes began to carry interest, and collect all the notes of the defendants; or, by neglecting so to do, leaving with them \$975, a part of which was not due under two, three, and four years, to meet that mortgage. Our construction of this contract, then, is this, that the covenant, contained in the agreement, that the defendants should not be holden, or obligated to make any further payments on the notes, given to secure the purchase money, extends to all the notes given, and, of consequence, to the note in suit; and that the failure of Lewis to pay the Dain mortgage, operated as a releasing of all the notes. The judgment must, therefore, be affirmed.

FREDERICK DOWNER v. JOHN DOWNER.

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A testator made a bequest to a trustee, to be applied to the benefit of the *cestui que trust*, as should be found necessary, in the judgment and discretion of the judge of probate for the district of H.—*Held*, that the trustee was accountable for the property, received as trustee, in a court of Chancery, and not in the court of probate; that, in the exercise of the *discretion and judgment*, confided to him, the judge of probate acted personally, and not officially, and no appeal lay, to the Supreme Court, from his proceedings and doings.

The facts in this case will appear in the opinion of the court, delivered by

WILLIAMS, Ch. J. It appears that Andrew Downer, deceased, made his will, in which was a bequest in the following words: "I also give and bequeath to my son, Frederick Downer, for his use and benefit, \$666,67; which sum is to be paid, by my executors, into the hands of my son, John Downer, in trust, for the benefit and comfort of my son Frederick; and it is my will and direction that the said trustee pay over, quarterly, in each year, the interest and profits of said sum, for the comfort and support of my son Frederick and his family, as he may want and stand in need; and it is my will, if occasion should require, that such sums of the principal should, from time to time, be applied for his comfort, as shall be found necessary in the judgment and discretion of the judge of probate, for the district of Hartford." It appears that the legacy abated, so that only \$300,89, was paid to the trustee. The judge of probate has made two orders, as to the expenditure of the legacy; one on the 7th May, 1828, the other on the 2d September, 1829.

In December, 1834, John Downer, the trustee, was called to render his account before the court of probate. His account rendered was disallowed in part, and it was adjudged that he had in his hands the sum of \$215,73. From this order he appealed to this court, and on this appeal the case comes before us. The account has been referred to a commissioner, who has made his report, and on that report several questions have been argued.

As this case comes before us on an appeal from the court of probate, our jurisdiction is only appellate, and we can only exercise those powers, which belong to a court of probate. The court of probate, we consider, had no jurisdiction over the trustee, and was not the tribunal, before whom his accounts were to be adjusted, and they could not make any order in the premises.

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The will constituted John Downer a trustee. He received the legacy, as such, and must be holden to account, as other trustees, and subject to the same regulations. He is amenable to a court of Chancery, and not the court of probate. The reference in the will, to the judgment and discretion of the judge of probate for the district of Hartford, does not give him any new jurisdiction, or authorize the court of probate to call the trustee to account, or make any order or decree in relation thereto. The expression in the will designates the individual, who holds the office of judge of probate for the district of Hartford, as the person, whose judgment or discretion was to be exercised, and who was to be consulted by the trustee, if any expenditures, beyond the interest of the legacy, became necessary. In the exercise of that discretion and judgment, the judge would not act officially, but personally ; and, of course, there could be no appeal from his proceedings and doings.

As the court of probate had no jurisdiction over the trustee, and had no authority to examine into or settle his accounts, the proceedings in this case are irregular, and the cause must be dismissed.

D. Pierce, for appellant.

T. Hutchinson, for appellee.

EBENEZER RIX v. DAVID ADAMS & GEORGE THROOP.Windsor,
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If one procure another to become his surety, and subsequently procure a third person to sign a promise of indemnity to the first surety, there being no new consideration, and this not being done in consideration of any contract, made at the time of the original contract, the contract of indemnity is void, for want of consideration.

Forbearance to sue for an indefinite time, or a promise to remain, as surety for another, for an indefinite time, is no sufficient consideration for a promise to pay the debt, in the one case, or to indemnify the surety in the other.

This case came before this court on exceptions to the decision of the county court, against the sufficiency of the first count in plaintiff's declaration, on demurrer and joinder. That count was as follows :

"For that, at said Royalton, on the thirtieth day of March, "in the year of our Lord, one thousand eight hundred and "thirty two, the said David Adams was making a contract with "Solomon Downer, of Sharon, in said county, and becoming "indebted to said Downer, and was about to give him a note, "with surety, for the sum of one hundred and five dollars, payable by the tenth day of July, then next, with interest ; and "the plaintiff, at the request of said Adams, consented to give "said note, with and for the said Adams, and did then and there, "together with the said Adams, sign and deliver to the said "Downer, the note of said Adams and the plaintiff, for the sum "of one hundred and five dollars, payable to said Downer or "order, by the tenth day of July, then next, with interest ; and "bearing date on the same thirtieth day of March, in said year, "one thousand eight hundred and thirty two ; which said note "was given solely for the debt of the said Adams, and the plaintiff had no interest in the same, except as becoming surety for "the said Adams, as aforesaid. And afterwards, at said Bethel, "on the tenth day of April, in the year of our Lord one thousand eight hundred and thirty-four, the said Adams had not "paid said note, and the plaintiff was in fear that the said Adams was becoming less responsible in point of property, and "was unwilling to remain as surety and have said note remain "longer unpaid, without some better security to himself than "was that of said Adams, which was well known to the said "Adams, to wit, at said Bethel, on the day and year last aforesaid ; in consideration of which premises, and to keep the "plaintiff easy and contented, without the immediate payment

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"and discharge of said note, and to render the plaintiff secure against any further trouble or cost, in consequence of his having signed said note with and for the said Adams, as aforesaid, and in consequence of the same note remaining unpaid for some indefinite period longer, the said Adams, for himself, and the said Throop, at the request of the said Adams, by their writing, bearing date on the same tenth day of April, in said year, one thousand eight hundred and thirty-four, promised the plaintiff, that they, the said defendants, would save the plaintiff harmless from all cost and damages, which might accrue to him in consequence of his, the plaintiff's, having signed said note to said Downer, as aforesaid; yet the said defendants have not saved the plaintiff harmless from all cost and damages accruing to him in consequence of his having signed said note, as aforesaid; but, they have wholly neglected to pay said note, and the plaintiff has been compelled to pay, and has paid, the same, and interest thereon, amounting in the whole to a large sum, to wit, to the sum of one hundred and fifty dollars, to wit, at Bethel, aforesaid, on the first day of July, in the present year of our Lord, one thousand eight hundred and thirty-five; of which said defendants then and there had due notice, and were requested to pay the same to the plaintiff."

T. Hutchinson, for plaintiff.

It is expressly averred that the plaintiff's liability to Downer was created for the sole benefit of Adams, and at his request, and that the plaintiff had no other interest in the concern than as surety for Adams. That a thing done at the request of A., though all be in the past tense, forms a good consideration for a promise made by A., see the cases cited in the case of *Bloss v. Kitteridge*, 5 Vt. Rep. 28. Also the case itself. Also see 2 Starkie's Ev. 92, 93.

If Adams was holden, by the original transaction, to save the plaintiff harmless from the note given to Downer, no new consideration was necessary to support a new promise from Adams to save the plaintiff harmless from said note. His existing liability was a sufficient consideration for a new promise. Even if the statute of limitations had run upon the original liability, still, a new promise to pay needs no new consideration. None is ever alleged or proved in any of the numerous cases, in which a new promise has been adjudged to take the contract out of the statute.

There surely, then, could be no doubt of a sufficient consideration, if this suit were against Adams alone.

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How does it stand against Adams and Throop? Under all the circumstances, named in the declaration, of Adams' liability to the plaintiff to save him, the plaintiff, harmless from the note given to Downer, and the plaintiff's unwillingness to remain any longer without further security, the said Adams, for himself, and the said Throop, at the request of said Adams, by their uniting &c. having promised, forms a good consideration as to both. The request of Adams to Throop formed a good consideration as between Adams and Throop, and when any man requests and procures a collateral signer for his own responsibility, no consideration need to pass, nor does any ever pass from the promisee to the person thus signing as collateral security. Otherwise there would be an end of principal and surety. All would, of course, be principals, if a consideration had to pass from the promisee to each promisor, or to both promisors.

Upon this point we are not destitute of support from authority. In *Bailey & Bogert v. Freeman*, 11 Johns. Rep. 221, the case was, the plaintiffs had an execution against N. Blanche, who wanted time of payment, and wrote and signed an agreement to pay the plaintiffs the amount of their execution in a certain way, and by a given time, and went with the clerk of the plaintiff's attorney to the defendant, who signed a writing as follows: "I do hereby guaranty the performance of the above agreement, and every part thereof, on the part of said Blanche, if he be alive at the time of performance." The defendant was adjudged liable; and the court say, "this guaranty was an original collateral agreement." Again, "the credit was originally given to the defendant, as surety, and it was therefore unnecessary to show a separate consideration for the promise of the defendant." And the court cited *Leonard v. Vredenburg*, 8 Johns. Rep. 29, and *Hunt v. Adams*, 5 Mass. Rep. 358. In the first of which Kent, Ch. J. says: "the case before us is a guaranty or promise, collateral to the principal contract, but made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration, than that moving between the creditor and original debtor." The case in 5 Mass. Rep. is equally in point. In all these the courts attach importance to the unity of time, as to the execution

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of the separate guaranty, and the principal contract ; for if the guaranty were afterwards, the statute of frauds might interfere. But in this case the signings are set up as joint and simultaneous, and must, of course, on demurrer, be considered as simultaneous.

It is only necessary to notice what are termed *the premises*, where the declaration says, *in consideration of the premises*, and to keep the plaintiff easy and contented without the immediate payment and discharge of said note, and to render the plaintiff secure against any further trouble or cost, in consequence of his having signed said note.

No language could make it more certain, than the averments in this declaration make it, that the whole business was done for the benefit of Adams, and that Throop signed at the request of Adams, and that the plaintiff had no interest or concern in the matter, except as bail for Adams to Downer, and receiving this promise of indemnity from Adams and Throop ; and that Adams was under not only a moral, but a legal obligation, to save the plaintiff harmless from the note to Downer ; and that Throop, at the request of Adams, joined with Adams in an express written promise, to save the plaintiff harmless from his said liability to Downer ; and that they have not done so, and plaintiff has been compelled to pay, and has paid, the note to Downer. See 2 M. & S. Rep. 345.

Charles Marsh & Julius Converse, for defendants.

The declaration counts on a mere naked promise in writing, containing no suggestion of a consideration, to indemnify the plaintiff for signing a note with Adams to Downer.

The declaration, however, travels ought of the writing, to hunt up and state a consideration for the promise.

The demurrer is taken simply on the ground, that no consideration for the promise appears to have been made, or existed at the time of the transaction.

In stating the transaction and a variety of facts, the declaration says, "in consideration of which premises," &c. In looking into the premises, nothing like a consideration is stated.

The premises—the things premised, or before stated—are the signing of the note to Downer, by the plaintiff, as surety for Adams, and that, sometime afterwards, the plaintiff *was in fear* that Adams was becoming less responsible, and plaintiff was, therefore, unwilling to remain as surety on the note, and have

the note remain longer unpaid, without some better security to himself, and that this was known to Adams.

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Now these are all the *premises* stated. But what is there in these premises like a consideration?

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A consideration is something done or passing, at the time of making the contract, which is beneficial to the promisor, or injurious to the promisee, or some legal or moral obligation, previously resting on the promisor. Now we look in vain through the declaration, for any thing answering to this definition—certainly so, in relation to defendant Throop, and it is believed, also, in relation to both defendants.

As to Throop, there can be no pretence, and as to the plaintiff and Adams, nothing was paid to the defendant, and the plaintiff, by this naked writing, was deprived of no right—he did not agree to wait any given time, and might, as well the day after the executing of the writing, as the day before, have gone and paid up the note and sued Adams on his implied promise to indemnify, or for money laid out and expended.

The relative situation and the respective rights, duties and liabilities of the parties remained the same after, as before, the execution of the writing, and were, in no respect, changed, except, that the plaintiff laid aside *his fears* and remained easy and contented. But the plaintiff, as if not exactly satisfied with the consideration, arising out of the *premises*, proceeds to state, not any further consideration, but to assign other motives, which induced defendant to execute the writing declared on—that is, “To keep the plaintiff easy and contented without the immediate payment and discharge of said note, and to render him “secure against further cost and trouble, in consequence of having signed the note, and in consequence of having the same “note yet remaining unpaid, for an indefinite period longer.”

Will it be pretended that the wish to render the plaintiff easy and contented, while the defendants did nothing to make themselves liable, amounts to a consideration? Suppose defendants had believed Adams was good, and the plaintiff was safe, and had so stated their belief, and the plaintiff had gone away *easy* and *contented*, his situation would have been the same as now, and yet, defendant would have incurred no liability. Again, suppose they intended, by this writing, to render the plaintiff secure, when the contract they entered into did not make him secure nor create any liability, would this amount to a *consideration*? The court can intend nothing more than that de-

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defendants intended to incur all the liability, which the writing lays them under, and nothing more. And if plaintiff chose to remain *easy and contented*, and sleep on his rights, with such security only, he had a right so to do, and can not now complain, however insufficient it may prove for his indemnity.

The subject of consideration, is very ably discussed and fully settled in the case of *Forth v. Staunton*, 1 Saun. Rep. 210, and in the notes of that case, and the law on the subject well settled. 1st. That the common law required an adequate consideration, before the statute of frauds, and that statute has not varied the common law in that respect, but merely added the requisition, that, in certain specified cases, the promise must be reduced to writing. 2nd. That forbearance is a good consideration. But all the cases referred to show that there must be an agreement to forbear, and an actual forbearance for a specified time. *Reynolds v. Proctor*, Hardress' Rep. 71. *Ran v. Hughes*, 7 T. Rep. 346, note.

In *Fish v. Richardson*, Yel. Rep. 55, 56, the plaintiff was to forbear till such a time, and did forbear accordingly. This was deemed a sufficient consideration to charge defendant, who was administrator, *de bonis propriis*. Cro. Jac. 47. *Barber v. Fox*, 2 Saunders' Rep. 137, (note.)

A promise to forbear an indefinite time is no promise, at all. It expires as soon as made, and is of no benefit to defendant or injury to plaintiff. In the case before the court, there is no agreement, whatever, on the part of plaintiff, to forbear any time, whatever, or to do or omit any thing, which can, in any way, affect the rights, duties or interests of either party. The only case, which has fallen under our notice, intimating that a consideration can be dispensed with, in any contract, is the case of *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. Rep 1663, and that was decided on the principles of the law Merchant, and the court admit that, at common law, a promise without consideration is void.

The opinion of the court was delivered by

REDFIELD, J.—If the contract, alleged in the declaration, is founded upon any consideration, it must be the original undertaking of Adams, as principal, in the debt to Downer, or the "keeping plaintiff easy," in his relation of surety to Downer. The latter consideration is one, *in its terms*, of rather novel impression; but in fact, it is synonymous with forbearance. The

contract, then, is substantially that of defendants, jointly guarantying plaintiff's immunity on his liability to Downer. There is no pretence of any consideration moving between Throop and Rix. Throop is the surety of Adams in the last contract. And the consideration between the principal debtor and the creditor is that, which makes the obligation of the surety, in any case, binding.

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But what is the consideration of this new contract, as between Adams and Rix? Rix had, long before this, assumed the obligation of surety, and without any expectation of this, or any other special indemnity. Had the contract been made in pursuance of a contract entered into at the time of plaintiff's becoming surety for Adams to Downer, it would be considered a part of that contract, and upon sufficient consideration. *Knapp v. Parker*, 6 Vt. Rep. 642. But that is not this case. There was nothing, then, in Adams' original contract with plaintiff, which looked towards the present contract, or will support it. This does not seem to be relied upon by the plaintiff. His declaration is not formed with reference to any such consideration.

In relation to the consideration of forbearance, we can well suppose a case, where the consideration is sufficient to support a new and independent contract of indemnity, of the character now contended for. If there had been an undertaking, on the part of Downer, upon sufficient consideration, to wait a definite time on the original debt, and the plaintiff had promised to stand surety, during that term, and this contract, now in suit, had been made to induce the *forbearance*, the defendants would no doubt be liable upon their contract. But such is not the contract alleged. The undertaking of Adams, so far as his previous obligation is concerned, is like one guarantying the payment of his own debt, and is never the foundation of a new promise, unless the original liability is merged and lost in the new contract. If it is pretended Adams assumed a new and different liability from that, which before existed, then it was a mere naked promise, founded upon no sufficient consideration. It was, in either case, founded upon a past and executed consideration, and, as such, void. It is very similar to the case of *Harding v. Craigie*, 8 Vt. Rep. 501. Plaintiff had not become Adams' surety at Throop's request, or for his benefit. There is no benefit accruing to defendant, for this new promise, and no injury to plaintiff. He did not undertake to stand surety for Adams, for any defi-

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nite time, and a promise to remain surety an *indefinite* time, to be determined at his own option, was as no promise, for he was already surety on those identical terms. The contract being in writing does not vary the case. It obviates the statute of frauds, but will not dispense with the necessity of a sufficient consideration. The undertaking "of one man for the debt, default, and miscarriage of another," must not only be in writing, but upon some sufficient consideration. The declaration is insufficient, and the Judgment below must be affirmed.

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The heirs of SMITH v. DANIEL RIX, Administrator.

In appeals from the probate court, this court sits as a Supreme Court of probate. The whole case, both law and fact, is before them, but the facts must be found by commissioners.

The court of probate, by petition for that purpose, may correct errors in its former decrees, after any lapse of time short of twenty years, where the interest of the parties only is concerned. But this should only be done, where the errors are apparent, or conceded by the parties, or proved *beyond all doubt*.

This was an appeal from the probate court, on the petition of the heirs of Jacob Smith, late of Royalton deceased, against the administrator, praying that certain errors in a decree of the probate court, on a partial accounting of the administrator and his former colleague, in the month of January, 1820, should be corrected.

It was admitted that the administrators had been credited \$84, on account of a debt allowed one Noble, by the commissioners, and by them reported at \$84, when, in fact, the debt was only \$0,84, and was, by the administrators, paid and settled for 84 cents.

The other mistake was in allowing the administrators the full amount allowed the town of Royalton, as due from the estate, for money collected and not accounted for, when in fact, there had been collected and paid into the treasury of the town \$138, which was allowed the administrators on settlement with the town, or collected from the persons, from whom the taxes were due, and should have been accounted for by the administrators.

After the case was entered in this court, the counsel for the petitioner moved to dismiss the proceedings.

The opinion of the court was delivered by

REDFIELD, J.—It is claimed, that the probate court had no jurisdiction of this petition, after such lapse of time. It is incident to every court of record to revise and correct its own proceedings. In those courts, where the proceedings are according to the course of the common law, the usual and appropriate resorts, are writ of error, *audita querela*, petitions for new trial, and, sometimes, motion merely. It was held in a case some years since in this court, in Orleans county, that an error in taxing a bill of cost could only be corrected by motion. It was decided on the present circuit, in Franklin county, that the mistake of the county court, in assessing damages, could not be corrected by an *audita querela*, but only on motion. This mode of correcting the misprisions of the clerks in this court and the county court is familiar with the profession. It is incident to all courts, and especially to those courts, whose proceedings are not according to the course of the common law. In courts of probate, this is usually done upon petition and notice to the adverse party, as in the present case.

The lapse of time, it is contended here, should prevent the court from re-examining their former decree. There is no statute of limitations applicable to the subject. Twenty years have not elapsed, so as to prevent both parties from disputing or enforcing the judgment. Indeed, the petitioner is now attempting to enforce this erroneous decree. We think any time, short of twenty years, will not bar the court from correcting their orders, judgments or decrees, when the parties only are concerned. But, most undoubtedly, they should enter upon such re-examination with great caution, and only upon the most conclusive evidence.

As the appeal in this case brings the whole cause before this court, to be determined upon its merits, as the supreme court of probate, the motion to dismiss being overruled, the case must be referred to commissioners to find the facts, unless they are conceded. The facts being agreed here, as in the probate court, this court decreed the correction of those errors, and certified the decree to the probate court, to be there perfected and carried into effect.

Aikens & Edgerton, for petitioners.

Titus Hutchinson, for petitioner.

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LYMAN MOWER and R. D. GRANGER v. TITUS HUTCHINSON.

(In Chancery.)

R., being the owner of a farm and a fall of water, conveys by deed all the land, which shall be subject to be covered by water, in consequence of a dam six feet high from low water mark, between Sept. and May; and in a subsequent deed conveys, with a like description, excepting the lands of B. and J.: *Held*, that the deed conveyed a right to flow all the grantor's land by such dam: That the dam might be raised six feet from the bed of the stream as it was when the deed was executed.

M., who was the owner of works on the dam, together with H, purchased the farm which was owned by R., and agreed upon a division, but the deed was taken to them jointly, and they released, each to the other, their respective portions of the farm, agreeably to the division: *Held*, that the release from M. to H. conveyed the right which he had, as owner of the works, to flow the land thus released; but that it was inequitable that it should so operate, and that H. should be enjoined from giving the lease in evidence, as conveying the right, which M. had to flow the lands.

A right to flow, derived from grant, is not lost by *non user*, when it cannot be used without disturbing the right of others, but may be exercised whenever the right of the others can be extinguished or bought.

The bill, in this case, sets forth, that Mower, one of the orators, on the 3d day of June, 1819, was the owner of an oil mill, on the South branch of Queechee river, in Woodstock, and, as appurtenant thereto, of a right of flowing a portion of the easterly part of a farm, called the Briggs farm, through which said branch ran, and that the defendant had knowledge of such ownership; that, on that day, Mower and defendant agreed to purchase the Briggs farm, upon an understanding to divide the farm between them; Mower to have the part West of the road leading to the South village in Woodstock, and defendant to have the part East of that road;—that they agreed to take separate deeds, each taking a deed of the portions above stated, and that they regarded the transaction as a separate purchase, in fact, of said portions; but that, the grantor declining to give separate deeds, they concluded to take a joint deed, and afterwards divide the farm, by mutual quit-claims, in the manner previously agreed upon;—that each paid, or secured to be paid, his portion of the purchase money, according to his share of the farm, and that, afterwards, on the 1st day of April, 1820, they executed the quit claim deeds, in pursuance of their previous agreement, the deeds containing a nominal consideration only, none, in fact, having been paid by either party. The bill further stated that

the said deeds were intended only to operate as a partition between Mower and the defendant, of the title derived from their joint grantor, and that Mower neither intended to convey nor impair, nor did the defendant intend to purchase, the right of flowing the land on Mower's part of the farm; that the subject of said flowing was neither discussed nor thought of by them, and that, if the deed from Mower to defendant conveyed or impaired said right, it was wholly a mistake of the parties.

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The bill also set forth, that Mower, on the 10th December, 1829, conveyed the mill and said right of flowing to the orator, Granger, by deed of warranty, and that said Granger entered upon the premises, made improvements thereon, and occupied and used the said right of flowing; and that defendant, at the December term of of Windsor county court, 1833, instituted an action against Granger, for flowing defendant's land, and, on the trial of said action, at the May term, 1834, gave in evidence, altho' objected to, the quit-claim deed from Mower to him, as conveying or extinguishing said right of flowing, and, upon that evidence, obtained a verdict against Granger for damages, and that said action was reviewed by Granger, and was still pending in said county court.

The bill also alleged that Mower acquired the right of flowing said land, by deed, dated 21st May, 1802, from Stephen Powers, who then owned said Briggs farm, to Elkanah Phelps, and by a chain of mesne conveyances, from said Phelps to Mower, all of which deeds were duly recorded before the 3d day of June, 1819.

There were other facts stated in the bill, which will appear in the opinion of of the court. The prayer of the bill was, that the defendant might "be perpetually enjoined to refrain, in any future trial, which may be had in said cause, and in any action hereafter commenced, from offering or relying upon the said quit-claim deed from the said Mower, as releasing, extinguishing or in any way affecting or impairing the said right of flowage, and be decreed to release to the orators, or one of them, all right or title to the said right of flowage, by virtue of the said deed of quit-claim from the said Mower, and all power and authority or right, in any way, to impair or impede the exercise or enjoyment of the same, and be enjoined from further prosecuting the said action in the county court."

The answer of the defendant denied all knowledge or belief that Mower ever had or exercised, or pretended to exercise any

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right of flowage, such as was alleged in the bill, at any time, excepting between the first day of September and the first day of the next succeeding May, annually, and alleged that the defendant had always understood that Mower's right of flowing, within those months, was limited to such extent, as would be produced by a dam six feet high, above low water mark; but that the present dam is seven and an half feet high above the aproning below the dam, and nine feet above the surface of the water below the dam, at low water. The answer admitted that Jireh Swift, the immediate grantor of Mower and the defendant, was, on the 3d June, 1819, seized, in fee, of the Briggs farm, and that whatever right of flowing then existed, extended to that part of the farm, lying on the East side of the road mentioned in the orators' bill. It also admitted that they agreed to purchase the farm together and divide it by the said road, but alleged that the conveyance was taken to them jointly, because they had not, at the date of the deed, agreed which of them should take the tavern house on a part of said farm. It further admitted that they, each, gave separate notes and security for their respective portions of the purchase money; that the quit-claim deeds between Mower and the defendant were executed in the manner and for the consideration, stated in the orators' bill, but denied that the defendant, up to, or at the time of executing said deed, ever suspected or heard from Mower, or any other person, that Mower had or pretended to have any right to keep up the pond, at all, between the 1st of May and the 1st of September, in each year. The answer further alleged that the defendant always believed and still believed that Mower, while he owned the mill, never did attempt to keep up the water in the pond, or use it in operating the mill between the 1st of May and the 1st of September, except, possibly, for a day or two, after the 1st of May, to finish the work on hand in the mill, and that defendant, had he known of any such claim of flowing the farm, as is now asserted, would either have refused to purchase, at any price, or except at a much less price than he paid for it. With regard to the deed from Powers to Phelps and the chain of deeds to Mower, the defendant answered, that he had no motive for searching the records, to ascertain whether they were recorded. And the defendant insisted that such deeds conveyed to the orators no such right, as they claimed, of flowing the land in question, and that if they ever did give such right, it had been

lost by *non user*; and that, at all events, such right was conveyed by Mower to defendant, and the right of the former to complain was forfeited by his neglect to notify defendant of his said right.

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At the time of receiving the deed of the Briggs farm, to wit, on the 3d of June, 1819, Mower and defendant executed the following agreement, viz:—

“Whereas, Lyman Mower and Titus Hutchinson have this day bought of Jireh Swift the Briggs farm, so called, now occupied by John Pratt, for which we are to give three thousand dollars, and pay a sixth part on the 1st of April next, and give security for other five yearly payments, on interest from that time; now we hereby mutually agree with each other that said Hutchinson shall quit to said Mower that part of said farm, which lies on the West side of the highway, leading South through said farm, and said Mower is to give twenty dollars an acre for the same, and pay the same proportionably on said payments to said Swift;—and that said Mower shall quit to said Hutchinson the remainder of said farm, and the said Hutchinson to pay to said Swift the remainder of said purchase money after deducting said sum so to be paid by said Mower, as aforesaid.

June 3d, 1819.

(Signed,)

TITUS HUTCHINSON. (Seal.)

(Signed,)

LYMAN MOWER.” (Seal.)

Such other facts, shewn on the hearing, as are material in the case, will sufficiently appear in the opinion of the court delivered by

WILLIAMS, CHANCELLOR.—It has been considered, by both parties, necessary to inquire, as to the existence and extent of the right, claimed by the orators, to keep up a dam and thereby overflow the lands of the defendant. The answer of the defendant admits, or rather recognizes a right, in the complainants, to keep up the water to some extent, except between the first day of May and the first day of the succeeding September, annually, but does not admit any right, or that the defendant had any knowledge of any claim of the complainants, as set forth in the bill. From the papers in evidence, it appears, that on the 11th of May, 1792, Jason Richardson, who then owned the premises, now owned by both parties to this bill, executed a deed to James Wilder of about one quarter of an acre of land, and at the same

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time executed a lease, which is in the words following: "all those lands lying upon Queeche South branch, which shall be subject to be covered by water, upon (by) virtue of a dam being erected six feet in height from low water mark, on about one quarter of an acre of land, lying on said stream, the southerly side of the road that leads from the court house towards Hartland, which I have conveyed by deed to the said Wilder, bearing date with these presents. The said Wilder to have the privilege of covering all that land by water, southerly from said quarter of an acre, upon the stream, for the space of about fifty nine rods and a half to the height of a ledge of rocks, which is reputed the lower end of the upper meadow, reference being had to the six feet height of dam being made on said quarter of an acre." To this lease there was a provision that the water be drawn or drained off yearly, and every year, from the first day of May until the first day of September. In April, 1800, Richardson conveyed a tract of land, bordering on this stream of water, to Nicholas Baylies. The title to this lot was conveyed by Baylies to Charles Marsh, in November, 1809; by Marsh to Norman Williams in November, 1810; by Williams to Sylvester Edson, in April, 1825. Edson, in November, 1828, conveyed to Fisher & M'Laughlin, a blacksmith's shop and certain water privileges in this dam. By the conveyance from Richardson to Baylies, the latter owned the land conveyed, subject only to such inconveniences or incumbrances as was created by the lease from Richardson to Wilder in 1792. From the testimony it appears, that when the water is raised by a dam, as now claimed by the orators, it is and always has been injurious to the land conveyed to Baylies.

It appears, that Jason Richardson, in March, 1807, conveyed the land owned by him, and which is the same land now owned by the defendant and complainant, to Stephen Powers. On the 21st of May, 1802, James Wilder conveyed all his interest in the works on the dam to Elkanah Phelps; and, on the same day, Stephen Powers executed a deed to Phelps. On the construction of this last deed, a question has been made. It is in the words following, to wit: "a piece or parcel of land lying on the South branch of Water Queeche river, so called, and, for a description, it being all that land, excepting the land belonging to Nicholas Baylies and Benjamin Swan, which is covered by the

"waters of the said south branch overflowing the dam of said Wilder's oil mill, on said branch, which dam is raised six feet above low water mark ; however, all those lands covered by said water, and are connected with the main body of water by small outlets, are not conveyed ; containing four acres more or less." In the deed there was an agreement on the part of Phelps, "that at any time, between the first of May and the last day of August, when the waters exceed four inches in height, above the top of said dam, the waters may be, by hoisting the gates, lowered to that height, and the said Phelps will so lower said waters, if they may be, by hoisting said gates." There was also added, after the execution of the deed, an agreement in the words following. "It is agreed that the said Phelps shall have the privilege of overflowing the lands, in consequence of raising the dam at the height within mentioned, without being liable to me, my heirs, or assigns, for any damages, whether the same is conveyed by this instrument, or not"—Signed by Powers and witnessed by Baylies, one of the witnesses to the deed. Although this addition is not sealed, and has only one attesting witness, it appears to have been recorded with the deed. The defendant contends, that this latter agreement can have no operation against the after purchasers from Powers ; that it is not a subject matter of record ; and no person is under obligation to notice it. Though I entertain a different opinion, and consider it a part of the deed, or a part of the description of the thing granted, and, of necessity, is to control the construction of the deed ; yet, a decision of the point is not necessary ; for we consider, that the deed, without the addition, as well as the one of 1792, did convey a right to flow all the lands of the grantor, by a dam six feet high, except as against the owners of the land belonging to Baylies and Swan ; and whenever the owners of these lands could be quieted, the grantee, Phelps, had the right to keep up a dam six feet high, subject only to the condition or agreement contained in the deed to him before cited. The written agreement, which was signed by the grantor, Powers, shews most conclusively that such was his understanding, and was probably added by the gentleman, who witnessed the deed and agreement, to guard against any misconception, and to make that more certain, which, we think, is sufficiently certain without it.

Upon a recurrence to the testimony, we find that it was so

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considered by those, who were interested in the works, situated at the dam, as well as by those, who owned the farm or land, first owned by Richardson, that sometimes with, and sometimes without the consent of the owners of the Baylies' place, the dam has been kept up, the lands overflowed, and none, but the owners of that place, have ever interfered.

The right or privilege, which was thus conveyed to Phelps, it appears, has come to the present orators by a regular chain of conveyances; and it also appears in testimony, that the farm was conveyed by Powers to John Briggs, in April, 1808; that the administrators of Briggs conveyed to Jireh Swift in February, 1814; that in June, 1819, the complainant, Mower, and the defendant purchased the same farm and took a deed to themselves jointly; and that in April, 1820, they mutually conveyed to each other the several parts of the farm, by them respectively purchased of Swift, agreeably to the original agreement. The several deeds from Powers, Briggs' administrators, and Swift, were deeds of warranty, containing the usual covenants against incumbrances.

It is, however, further urged in this case, that if there was any right thus granted to Phelps, the orators can claim no benefit from it, inasmuch as it has been lost, and the defendant and the owners of the farm have occupied it, without any inconvenience from the dam, for a long series of years. We think, however, there can be no foundation for the allegation that the orators have lost any right. The right arises from grant, and not from prescription, and if the orators could not avail themselves of it, to its full extent, without encroaching upon those, who occupied the Baylies place, and although it should have been dormant, in consequence of that, for any number of years; yet, they might use it against all others, and, whenever the right of the owners of the Baylies place could be purchased, or extinguished, or quieted, might use it without any interruption. Nothing would be lost by the interruption, or *non* use, in consequence of the claim of those, who owned the lot, originally purchased by Baylies. It appears abundantly from the testimony, that the grantees of Phelps and others, owning works on this dam, have, at various times, kept it up and flowed the lands, now owned by the defendant, in the summer season; and that the interference of Williams, who owned the Baylies place, was fre-

quently sought and obtained, by the persons who owned the farm affected by this overflowing of the water.

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As the orators have the right, of which we have spoken, by grant, and that grant is on record, the defendant is deemed, in law, to have notice of the same. All persons are considered as having notice of all the conveyances, on record, connected with their title. The deed from Richardson to Wilder, as well as the deed from Powers to Phelps, gave the right to erect a dam six feet high, and also to flow all the lands owned by the grantors, by raising the pond, which such a dam would raise, and created an incumbrance on those lands, and was similar to a grant of a right of way, or any other *easement* on the land. The grant was, therefore, of a part and parcel of the farm, which Powers owned, and which was afterwards purchased by the defendant and the complainant, Mower, and being on record, neither of them can now claim that they are purchasers without notice. This renders it unnecessary for us to attend to that part of the testimony, introduced to shew that the claim, or right in the owners of the dam, was a matter of public notoriety, known to the owners and occupants of the farm, and also to the present defendant.

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We have thus examined and considered the proof, as to the existence of the right claimed by the orators, and the result of our inquiries is, as has been already expressed, inasmuch as both parties have considered the cause as depending, in a great measure, upon the result to which we might come, on this part of the case. It may be doubtful, however, whether any thing further was required, than to find that the complainants have claimed such a right; as the principal inquiry is, what is the effect of the deed executed by Mower to the defendant, in April, 1820. Mower was, at that time, the owner of the oil mill, situated on the dam, and, with the owners of the other privileges on the dam, had the right of raising the dam and flowing the lands, which have already been considered. The defendant claims, both in his suit at law, and here, that the effect of the deed from Mower to him was to convey the land to him free from any incumbrances, and to extinguish any right which he, Mower, had, at that time, under the grant to Phelps, before mentioned; and the question now is, whether it is consistent with equity, that he should thus use this deed. It is not pretended in the answer, that any thing was paid to Mower for a grant of this

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right. The written agreement made between them was, that each should quit-claim to the other the parts of the farm deeded to them, which they had respectively agreed to take. Mower was to give twenty dollars an acre for that part of the farm, which he was to have, lying West of the road, and pay, in that proportion, on the notes executed for the purchase money, and the defendant to pay the residue. An after measurement was necessary to ascertain this proportion. This measurement was made, and they gave their notes for the proportion each was to pay, and executed the quit-claim deeds between themselves. It appears from their writing, that they had agreed upon the division of the farm, at the time of taking the deed, and Lyman, one of the witnesses, says, that they requested separate deeds, but he, as attorney of Swift, refused to comply with their request. As these quit-claim deeds, between Mower, the complainant, and the defendant, were executed in pursuance of the contract, and no consideration, therefore, passed from one to the other, they ought not to have any further operation than was contemplated by the parties;—that is, a partition between themselves. If Mower conveyed any other interest, than was conveyed to him, by the deed from Swift, it was evidently not so intended, and ought not so to operate. Both parties to this controversy had, in law, notice of the deeds previously executed by Richardson and Powers;—they may have labored under a mistake, as to the effects of their respective deeds;—the question, now in controversy, as to the right of flowing the land, may not have entered into their consideration, either because it was a matter of notoriety, or because it was not considered as creating any serious incumbrance. But neither should now claim any thing more than was then contemplated. If any claim on Swift, arising from his covenant against incumbrances, is lost, in consequence of the deed having been executed to the defendant and Mower, (on which, however, we have not formed any opinion,) it is a misfortune, which the parties must bear, and which they should have duly considered, when the deed was taken. It cannot justify the defendant in making any further use of the quit-claim deed, than was intended by the parties.

We have not taken into consideration, whether the present dam is either higher or lower than it ought to be by the grant. The dam may be erected as high as it was to be by the deeds of Richardson and Powers, that is, six feet above low water, as

the current then was, and they are not confined to six feet only, from the bottom of the river, as it may be, or may have been lowered, from time to time, by freshets or blasting rocks. The parties can establish their rights, in the suit at law; the orators may avail themselves of the grants, made in 1792 and 1802, by Richardson and Powers. If they have exceeded those, they are still liable at law. Our decision is only to this effect, that the quit-claim deed, executed by Mower, shall not affect those rights, any further than if Swift had directly conveyed to the defendant the part, which was quit-claimed to him by Mower. The orators, therefore, will be entitled to a decree, enjoining the defendant, at all times hereafter, in any future trial, which may be had, of the cause now pending in the county court, in favor of the defendant, Hutchinson, against the complainant, Granger, or in any action hereafter to be commenced, from offering, or relying on the said quit-claim deed from Mower, as releasing, extinguishing, or in any way affecting or impairing, the right which he, Mower, had, at the date of the deed, to flow the lands therein conveyed; but are not entitled to cost, as they seek to be relieved against a mistake of Mower, as well as of the defendant.

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Marsh & Williams, for the complainants.

Hutchinson, pro se.

ORANGE COUNTY.

MARCH TERM, 1837.

PRESENT, HON. STEPHEN ROYCE, }
 " SAMUEL S. PHELPS. } *Assistant Justices.*
 " JACOB COLLAMER. }
 " ISAAC F. REDFIELD. }

HARRY HOLMES v. WILLIAM S. BURTON, FRANKLIN OLDS, &
 ELIAS LYMAN.

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One of three partners (the partnership being notorious,) purchases a horse, for which he gives his individual note: The partners are not liable, although the avails of the horse, when sold, go into their partnership fund.

This was an action of assumpsit, in three counts, against the defendants, as joint partners with one Levi Blood, under the firm of Levi Blood & Co. The first count was upon a note, alleged to have been signed by said Levi Blood, "for the interest, profit, and benefit of the said firm of Levi Blood & Co." The second and third counts were for a horse sold by plaintiff to defendants. The defendants pleaded *non assumpsit*. Issue joined to the court.

On the trial of said issue, the plaintiff proved the following facts, to wit; In the year 1834 and 1835, the defendants, together with Levi Blood, were co-partners in trade, and carried on a retail store at Post mills village, under the name and style of "Levi Blood & Co." The business was conducted by said Levi Blood. He occasionally purchased and exchanged horses,

sometimes paying therefor, in part, in goods from said store. Of this course the defendants had occasionally expressed disapprobation. Neither of the defendants resided in the immediate vicinity of the store. In February or March, 1835, Blood purchased of the plaintiff a horse, for which he gave the note in question, signed in his own name. This horse, together with two others, he sold in April, 1835, for \$275. The price, at which he sold this horse, was \$100. This money was by him put into the other money of the concern, and entered on their cash book, as money received for horses sold. In June, 1835, Blood bought a horse of J. Eastman, for which he first executed his own note, but Eastman insisting on the name of the company, Blood added to his name the words "& Co." After this, the defendants and Blood dissolved, and Blood left the country. Upon this dissolution, it appeared, that, in taking an account of the condition of the concern, among the debts outstanding against the firm, was entered this note of Harry Holmes. When Blood left the concern, one Brown was received by the defendants as the acting partner, and to this new concern passed all the goods of the former one, and the horse so bought of Eastman and two other horses, which Blood then had. It did not appear directly that the defendants knew, at the dissolution, in what manner this note was signed. Brown, for the new concern, paid Eastman his note aforesaid. These were the whole facts proved. The court rendered judgment for the plaintiff, to which the defendants excepted, and the cause passed to this court.

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A. Tracy, for defendants.

I. The plaintiff cannot recover on the first count in his declaration, because there is a variance between the note declared on and the one produced in evidence.

II. He cannot recover on the other counts.

1. Because the transaction is not within the scope of the partnership dealings, and no knowledge or consent of the defendants is shown, and it is not sufficient, in such case, to show that the property went into the partnership fund.

2. Because the original cause of action is merged in the note in question. *Hutchins & Pickett v. Olcott*, 4 Vt. Rep. 549.

D. Cobb, and L. B. Peck, for plaintiff.

1. The court were authorized to presume, from the evidence, that the defendants empowered *Blood* to purchase the horse, on the credit and for the benefit of the company. At all events,

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there was evidence tending to prove this fact ; and whether the weight of evidence, on this point, was for or against the plaintiff, is not an inquiry before this court. The court below, who acted in the place of the jury, were the sole judges of the weight of the evidence. It is a question of law whether the testimony *legally tended* to prove the fact, and a question of fact, whether the testimony was sufficient. It is to be presumed the triers found the point satisfactorily established, as they gave judgment for the plaintiff.

2. As a matter of law, the plaintiff is entitled to recover. The horse went to the use of the company, and the note was treated by the defendants, as a claim outstanding against the company, at the time of the dissolution and settlement with Blood. They did not regard the money obtained for the horse, as having been procured and paid in, on the credit of Blood alone, but on that of the firm. No allowance was made him for the horse on the settlement, but it was treated as company property.

But it is said that the plaintiff took Blood's note for the horse, and it is, therefore, insisted, that he sold him on Blood's credit, and not on that of the defendants. This does not alter the case, if the horse was purchased and went for their benefit, unless the plaintiff knew, at the time, that the defendants were concerned with Blood, and having knowledge of this fact, trusted to the credit of the latter. The case does not show this knowledge in the plaintiff, and it is not to be presumed. He may, therefore, recover on the count for goods sold and delivered. *Reynolds et al. v. Cleaveland et al.* 4 Cowen, 282. *Muldon v. Whitlock*, 1 do. 290. *Schermerhorn et al. v. Loines et al.* 7 Johns. Rep. 311. *Everett et al. v. Chapman et al.* 6 Conn. Rep. 347.

The opinion of the court was delivered by

PHELPS, J.—We are of opinion, that the plaintiff cannot recover upon either count in his declaration. Not upon the first count, for the note is, on the face of it, the individual note of Blood, and not of the partners. Here is an open, notorious partnership, and the paper does not profess to bind them. Had the defendants been dormant partners, the case would have been different. The signature might then be understood to be that of the firm, and, with proper averments and proof, the plaintiff might recover against them. But here there is a partnership, open and notorious, and, upon the face of the note, the presump-

tion is, that the plaintiff relied upon the responsibility of Blood alone.

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Under the second count, the question is, whether the plaintiff can resort to the consideration of the note and recover as for goods sold.

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The first difficulty in this course is, that the note itself is evidence that the horse was not sold to the firm, nor upon their credit. It has been held, that if money be advanced to a firm, upon the individual security of one partner, the firm are not liable. This rule holds, where the partnership is public, although it may not apply to the case of a dormant partnership. It goes upon the ground that the creditor elects to take the individual security. Secondly. This not being the case of a dormant partnership, the plaintiff cannot recover upon his general count, unless he is at liberty to repudiate the note, and can also recover upon the sale, as if no note had been given. He can not repudiate the note, because there was no fraud nor concealment; and further, it is not a case, where the presumption would arise, that the purchase was made in behalf of the partnership. The purchase of horses is not within the legal scope of the partnership, and one partner has no authority to bind the other in this way. It is said, it is customary for mercantile firms in the country to deal in horses. This will not vary the case. If a particular firm have dealt in this way, it will afford evidence, in such case, of an authority in one partner to bind the other. But although the practice is common, it does not follow that it is a legal consequence of the connexion. Here, then, is a case, where a contract is made, not within the scope of the partnership, and where the partner has not pledged the credit of the partnership, but his own. He had neither authority to bind his fellows, nor did he attempt to do so. How, then, can the plaintiff recover?

The cases, cited by the plaintiff, are cases, where the purchase was within the scope and for the benefit of the partnership.

It is said, also, that the defendants may be considered, *quoad this purchase*, as dormant partners. Such a precedent would be dangerous in the extreme. It would obliterate the distinction between partnership debts and the individual debts of the partner, and it would be at variance with the settled law on the subject.

The defendants may, indeed, have had the ultimate proceeds of the transaction. But this is not enough. Property may go

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to the ultimate benefit of a firm, and still the partners may not be liable. If there be any case, in which one partner can purchase property, or loan money, to be put into a partnership, on his own account, the argument fails.

But there is no satisfactory evidence that the defendants had the benefit of this purchase. The money, for which the horse was sold, went into the concern, but upon what conditions, does not appear. For aught we know, Blood credited himself with the money.

As to the supposed adoption of the proceeding by the defendants, it is sufficient to say, that it does not appear that they ever adopted it, or recognized the debt as their own. The entering it, as a debt of the concern, was the act of Blood, and it does not appear that the defendants then knew how the note was signed. They could not be bound by any adoption of the act, unless with full knowledge of all the circumstances.

Judgment reversed, and cause remanded.

ABIATHAR G. BRITTON v. WARNER PRESTON Trustee of JAS.
LANGLEY.

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A negotiable promissory note is liable to be taken by a trustee process, as the property of the payee, notwithstanding an assignment of it by him, unless the maker has notice of the assignment. But after it has been once assigned, the rule is different, and it cannot be taken as the property of a subsequent holder, after a *bona fide* assignment by him, although no notice is given to the maker.

This was a trustee process. The County court adjudged Preston to be trustee of Langley, to which Preston excepted. The facts of the case sufficiently appear in the opinion of the court.

D. Cobb, and L. B. Peck, for trustee.

That the transfer of the notes in question from Langley to Moore was *bona fide*, and for a good consideration, has not heretofore, and it is presumed, will not now be questioned. The evidence is full and clear that the notes were delivered to secure the payment of a debt, due from the former to the latter, and were there no evidence in the case, other than the trustee's disclosure, the court would presume the transfer to have been made for an honest purpose, and upon good consideration. *Newell v. Adams*, 1 D. Chip. Rep. 346. The plaintiff put the case, in the court below, upon the ground that, his writ having been served before Moore gave Preston notice of the transfer from Langley, the assignment was overreached and defeated by his attachment; and, probably, this is the great question in the case.

I. The first section of the trustee act, 1 Comp. stat. 149, provides that if any person shall have, in his *possession*, any rights or credits of an absconding or concealed debtor, he may be trustee; and the 5th sec. of the same act declares, that if it shall appear from the disclosure of the trustee, or from other evidence, that he had rights or credits of the debtor, in his *possession*, at the *time* of the *service* of the trustee process, he shall be adjudged trustee, &c. This case, then, upon a correct construction of the act, does not come within its provisions; for Langley, months before the service of the plaintiff's writ, had transferred the notes to Moore. By this transfer, his interest in the notes passed to, and vested in Moore. Nothing could be attached under this process, but Langley's interest, and, as that had been previously transferred, there was nothing to attach. An attaching creditor cannot stand on a better footing than his debtor, if the assignment be not

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fraudulent as to creditors : and if he attach any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And, consequently, if his debtor have no interest in a *chose in action*, the creditor cannot acquire any, by his attachment. Therefore the want of notice to the trustee will not defeat the assignee's interest in the debt, in favor of an attaching creditor. *Dix et al. v. Cobb & Trustee*, 4 Mass. Rep. 508. *Amidown v. Wheelock & Trustee*, 8 Pick. 470. *Bholen et al. v. Cleaveland et al.*, 5 Mason, 174. *St. John v. Smith*, 1 Root, 156, and the cases there cited. *U. States v. Vaughan & Trustees*, 3 Binn. 394. 1 Dall. 3. 4 id. 279. 2 id. 211. 7 Vin. 225. pl. 15. 226. pl. 18. In Connecticut a somewhat different doctrine has been established. It is there held that, when a *chose in action* has been assigned, the promisee remains the legal owner of the debt, until notice of the assignment is given to the promisor. But when the debt has been once assigned, and notice given to the promisor, this deprives him in equity of the right of making payment to the original promisee, and compels him to hold the money in trust for the equitable owner and holder of the debt. The mere sale and delivery, therefore, is sufficient to destroy the equitable interest of the assignee ; and it is not necessary that the second, or any subsequent assignee, should give notice to the promisor, in order to protect the debt against the creditors of the payee, or any previous assignee. *Greene v. Gillett*, 5 Day, 485. In the present case, and long before the commencement of this suit, Preston had notice that notes had passed out of the hands of the payee, and gone into circulation, so that it is quite immaterial, as regards the decision of this case, whether the court adopt the Massachusetts or Connecticut rule. The application of either discharges the trustee.

II. But negotiable paper is not within the spirit and meaning of the trustee act ; especially after it has been put in circulation by the original holder. Our statute, relating to paper of this character, was passed to protect the maker in such payments as he might make to the payee, before notice of the assignment. We insist that, after a negotiable note has passed out of the hands of the payee, by indorsement, and the maker is apprised of this fact, the case is without the statute, and the note then stands upon the same footing as similar paper in England, and its circulation and the rights of the holder protected and controlled

by the law merchant. One of the cardinal principles of this law is, that the *bonâ fide* holder of a negotiable paper can be affected by nothing, save what appears upon its face. A negotiable note, before it has been negotiated, may be attached on a demand against the payee, liable to be defeated by the transfer of the note, at any time before it falls due. *Enos v. Tuttle*, 3 Conn. Rep. 27. Per Addison & Shippen, Js. 4 Dallas, 63. A note payable to one or his order, and indorsed in blank, is transferable merely by delivery. Doug. 633, 9. This right of transfer, *by delivery*, was part, if not the essence of the contract, which could not be defeated, or modified, by Preston himself. Ought this right of transfer to be defeated by a creditor of the holder? By the very terms of the contract, Preston is to pay the notes to the person, who shall hold them when they fall due. Can a creditor of any individual, through whose hands the notes may have passed in their circulation, change the nature of the contract, and, in effect, destroy the negotiability of the paper? This doctrine is startling, in the extreme. If it is applied to a promissory note, it must also be extended to bills of exchange. Will not the same principle embrace bank notes, payable to bearer? It is true they pass by *delivery*, and so do negotiable notes, indorsed in blank. The recognition of such a doctrine, by this court, must inevitably destroy the negotiation of any note or bill of exchange, out of the State, to which a citizen of Vermont is a party. The little confidence, which now exists abroad, in the negotiable paper of this State, would be entirely extinguished. It can hardly be believed that the Legislature ever intended that the act should have such an effect. It is very clear that the case at bar does not come within the *terms* of the act, and if it is brought within its provisions, it is only done by a most liberal construction of the statute. This court will not be inclined to extend the statute beyond the fair and obvious import of its terms, when the effect of a forced construction would entirely destroy, as regards this State, a system, to which England is, in a great measure, indebted for her power, and which is rapidly increasing the wealth of every commercial part of our own extended country. But if the plaintiff could bring his case within the statute, by construing it according to the ordinary sense of the words, still, if this construction would lead to the embarrassing result suggested, the grammatical sense of the words should be so modified, that the

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difficulty may be avoided. *Rex v. Pease et al.*, 4 B. & A. 30. 24 Com. L. Rep. 17. *Eyston v. Studd*, Plowd. 363. Bac. Abr. Statute, I.

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J. W. D. Parker and A. G. Britton, for plaintiff.

I. The statute, upon which the process is founded, being a remedial act, should be liberally and beneficially expounded, to prevent fraud and advance the remedy sought. This is wholly a statute process, prescribing a mode of calling funds out of the trustee's hands, which could not be reached there, by the ordinary process of the common law—thus transferring moneys from the trustee to the principal's creditor, by virtue of its own provisions alone, which the factor justly owes, and ought not in justice to detain. Com. Laws, 151. Sects. 1 & 5. *Huntington v. Bishop, trustee of Spooner*, 5 Vt. Rep. 195, 196.

II. Preston being here a mere stake-holder, as between the plaintiff and Moore, who defends under Preston, Moore, to entitle himself to this money against the right of this plaintiff, should prove notice to Preston of the assignment of the notes to him, before the trustee was summoned in this action, or should himself have instituted a similar process. The property of the notes was vested in Langley, by the indorsement from Smith to him, and the assent of Preston to that assignment operated as notice to him, and the interest in them has never legally passed out of Langley, so as to defeat the claim of the plaintiff. And Langley could have released Preston, at any time prior to the 20th November, 1835, and thus have defeated Moore's claim. *Tudor & Woodbridge v. Perkins*, 1 Swift's Dig. 731. *Strong, v. Strong*, 2 Aikens' Rep. 377. *Newell v. Adams*, 1 D. Chip. Rep. 346.

III. To whom could Preston have paid these notes, or to whom could he have made a legal tender—one that could have availed him, after the sale and indorsement to Langley—but to Langley? A tender to Langley by Preston, before notice that the notes had been passed from him to some other person, would be a bar to any action, that might be brought afterwards on these notes, in what hands soever they might be. On the 27th of October, 1835, the time these trustee suits were served, the property of these notes was in Langley, and a tender or payment, made to him by the payor of the notes, before service of the trustee process, would have been a good answer to discharge him as trustee. Again, had Preston sued Moore, could he have plead-

ed these notes in offset, without previous notice? Certainly not.

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IV. The service of the trustee process on the trustee fixes the property in his hands, from and after that time, for the benefit of the creditor plaintiff; and nothing can divert its application to the payment of the debt sued for, except a prior, better and permanent right, vested in some one else. Had Moore, in this case, such right, either in law or equity? The plaintiff contends that he had not. Moore had received these notes, in April, 1835, of Langley and had given a receipt for them, supposed as collateral security for a debt Langley owed Moore. Moore lies by and gives Preston no notice of the transaction for six months, nor until Langley had absconded. There is no pretence, then, that Preston knew that Moore had the notes until after the service of the trustee suits. The creditors, in these trustee suits, were the first to give Preston notice that they have claims against Langley, and wish to hold the property in his hands, belonging to Langley, for the payment. They, being first in diligence, are first in right both in law and equity. The court, in the case of *Huntington v. Bishop*, cited above, say the trustee process "is a creature of the statute, a part of the attachment law; and the object is to secure the estate of the principal debtor, to respond the judgment, rendered in the principal suit." Then he who sues and serves process first, in trustee suits, shall and must hold first. The principles laid down, in the case above cited, are such as we presume the court will sustain. The court, there speaking of the trustee process, say, "after the service of the process, the trustee becomes a stakeholder, a depository of the effects of the party, ultimately entitled to them. He is treated like a trustee. He is called upon to disclose under oath, as to the effects in his hands. And the trust is enforced precisely as it would be in chancery." The first attaching creditor holds first—the second before the third, and so on—*toties quoties*. The first creditor, who sues and serves process on the trustee, holds first, and so on, as in an attachment of real and personal estate. If the grantee of land neglect to record his deed, the creditors of the grantor may attach the land and hold it; and why? Because the grantee has neglected to give notice that he owns the land, by causing the evidence of his title to be recorded. Moore, if he had any demand against Langley, might, and now may commence his suit against Preston, as trustee of Lang-

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ley; and will it be contended that he stands on any better grounds, to hold the property, than if he had sued him on the 20th November, 1835, when Moore gave Preston notice that he held the notes in question? Suppose Langley had absconded with the notes in his hands, and had, the day before the service of the trustee process, transferred these notes to a third person, would such third person hold the pay on them against this plaintiff? Suppose Preston had met Langley in the State of New York, or elsewhere, and had paid or tendered him the money due on these notes, before he had had notice of the transfer to said third person? Will it be pretended, that such payment or tender would be no defence for Preston, should such third person sue him on the notes? Suppose again, that Moore had neglected to notify Preston that he had the notes, until after December Term 1835, and Preston had made his disclosure, and the court had adjudged him trustee, as they must have done. If the delivery of the notes to Moore vested the property in him, absolutely, without notice, the consequence would be, that Preston would have to pay the notes twice. Suppose Preston had been summoned as the trustee of Smith, after he had been notified of the transfer of the notes to Langley by Smith, and the fact of the transfer stated in the trustee's disclosure; could the court charge him as the trustee of Smith? *Stuart v. Barnum*, Brayton, 173.

V. Lastly—*vigilantibus, non dormientibus, leges subveniunt*. For want of being watchful, and by negligence, a right may be lost. The statute of limitations may bar a right. A party, by standing by and not asserting his right to property, when claimed by a creditor of a third person, may lose his right. Even the King loses his right to a waif, if the owner retake the property before the King's agent. 1 Black. Com. 297.

The opinion of the court was delivered by

PHELPS, J.—The note of Preston, which is the object of this process, appears to have been made payable, originally, to one Smith, was endorsed by him to Langley, the principal debtor, and subsequently by Langley to Moore. Notice was duly given to Preston of the first transfer, but no notice was given to him of the latter transfer, until after the service of this process, although the transfer took place before the attachment. Under these circumstances the question is raised, whether notice to Preston is essential to complete the transfer, or whether the at-

tachment, by this process, will overreach the assignment, by reason of the want of notice.

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This proceeding, being in the nature of an attachment, and proceeding, not only in form, but in substance, upon equitable principles, it follows that, like any other attachment, it will hold nothing, which is not equitably and legally the property of the debtor. In Massachusetts, where this process is common, it has been uniformly held, that it will not hold a chose in action, which has been previously assigned, and is not equitably and legally the property of the principal debtor, at the time of the attachment. This doctrine has always appeared to me to be most consonant to principle, although it must be admitted there are considerations of policy, which make strongly in favor of a different rule.

In Connecticut, on the other hand, it has been held, that notice of the transfer of a note is essential to the assignment, and if notice to the maker be wanting, the trustee or factorizing process will hold, notwithstanding the assignment. This rule has been adopted in this State, in preference to the Massachusetts rule, and is now, I believe, considered the settled law of the State. But this rule has never been applied to any but an assignment by the payee. After the note, if negotiable, has passed from his hands and become transferable by delivery only, it is not subject to this process, except as against the person, who is really and equitably the proprietor of the note, at the time of the service of the process. This was decided in *Greene v. Gillet*, 5 Day, 485. Whatever reason there may be for the rule requiring notice, so far as the original payee is concerned, it certainly fails, when the note has obtained circulation, and passes, like a bank bill, from hand to hand. To require notice, in such case, of every transfer, would embarrass the circulation of paper—would be productive of great inconvenience, and, in a majority of cases, operate unjustly in its application. There is no propriety in taking one man's property to pay the debt of another; and nothing reconciles me to the rule adopted in this State, except the consideration, that it may prevent frauds. But there is no precedent for extending the rule to a case like the present. In such a case, the authorities from Connecticut and Massachusetts agree. Considering the law of those States, in this particular, reasonable and just, we are inclined to adopt it and hold, in this case, that

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notice to Preston was not essential to the assignment by Langley to Moore.

Judgment of County Court reversed, and Judgment that Preston is not trustee.

Overseers of the Poor of FAIRLEE v. Overseers of the Poor of
CORINTH.

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The following return on a warning out process, to wit: "Aug. 22d, 1806, I then served this precept by leaving a true and attested copy of the same, and return, with the within named N. W., as the law directs," is sufficient.

This was an appeal from an order of removal, whereby Nathan Watson, a pauper, was ordered to be removed from Fairlee to Corinth; from which order Corinth appealed to the County Court. On the trial, it appeared that the pauper had his settlement in Corinth, unless prevented from gaining a settlement, by force of the following proceeding: Within the first year of Watson's residence in Corinth, a warning was issued, in due form of law, from the Selectmen, directing the Constable to summon Watson to depart said town. Upon that warning was the following return:

"Corinth, Aug. 22, 1806. I then served this precept, by leaving a true and attested copy of the same and return, with the within named Nathan Watson, as the law directs.

CALEB LADD, *Constable.*"

This was seasonably returned and recorded. The County Court decided that said return was sufficient and rendered judgment that said pauper was unduly removed, to which the plaintiffs excepted, and the cause passed to this Court.

L. B. Peck, for Fairlee.

The return of the constable is bad. It does not appear from the record, that the return on the original summons was indorsed on the copy, left with the pauper. The officer says, he left "a true and attested copy of the warning and return," and the inquiry here presents itself, to what return does he allude, and by whom was it made? It is not stated that it was the return entered on the warning. But suppose we presume such was the fact, the question arises;—was the return written on the copy?

The record shows no such fact, and it is not to be presumed. The court, in order to give effect to the warning, must intend—1st. That the return was the same with that on the original. 2nd. That it was indorsed on the copy left with the pauper. To presume these facts, will be extending the doctrine of presumption to a class of cases, in which this court have, heretofore, uniformly said, that nothing was to be taken by intendment.

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In *Townsend v. Athens*, 1 Vt. Rep. 284, the officer was required to summon *Jonas Deputrin* to leave the town of Athens. The officer's return was in the following words— "Athens, May 28, 1817. Then served the within precept by leaving a true and attested copy with ~~the~~ *with Jonas*, with my return hereon thereon indorsed." The court said that they could not presume the copy was left *with* the pauper, nor read with, for *within*, and therefore rejected the record.

In *Reading v. Rockingham*, 2 Aik. Rep. 272, the Court held, that when service of a warning is made, by leaving a copy with some person, other than the pauper, at the usual abode of such pauper, it is essential that the officer certify in his return, that the person, with whom he left the copy, was then resident therein.

In the case between *Barnet v. Concord*, 4 Vt. Rep. 564, the officer's return was in the following words. "Then served this precept by leaving a true and attested copy of the same at the last and usual place of abode of the within named *John S. Emerson*, *with a person of discretion, residing therein*, with my return hereon thereon endorsed."

The court held this return defective for two reasons. 1. That the name of the person with whom the copy was left, was not given. And 2nd. That it was not stated that he was of *sufficient* discretion.

If the same strictness, which obtained in the cases cited, is applied to the case under discussion, the county court evidently erred in admitting the record.

It may be said, that the inference arising from the face of the record is, that the officer has allusion to *his* return, and that it must have been entered on the copy, as it is usual for officers to indorse their returns on copies of their writs. The same argument might have been and, no doubt, was used, in the case between *Reading and Rockingham*, and that of *Barnet and Concord*, for it is equally true, that when an officer serves any process by leaving a copy at the abode of the individual, on whom it is served, with some person he may find there, he takes care to ascertain that *such* person is a resident of the family, and of sufficient discretion. He neither leaves it with a *transient* person, nor an *idiot* or *lunatic*. The court has not and does not act upon inference or conjecture. In the present case, the return may be literally true, and yet very far from a compliance

with the statute. The officer may have put upon the copy a return entirely different from that on the original—or the return may have been entered on a separate and distinct paper, and this delivered to the pauper, at some other time. This would not be in conformity with the statute, nor would it contradict the return on the record. It would be impossible, then, either to deny the return, or to recover against the constable for a false return. This view of the case, according to the principle laid down in *Barnet v. Concord*, renders the record defective.

Vide also *Kittredge v. Bellows*, 4 N. H. Rep. 424.

W. Upham, for Corinth.

It is objected that this return is defective, 1st. Because it does not appear what return the constable left with Watson, or, in other words, it does not appear that it was the officer's return of the service of the precept, that he left with Watson.

2nd. Because it does not appear that the return was on the copy, left with the person warned to depart the town.

In answer to these objections, we insist, 1st, That it does appear that it was the constable's return of service of the precept, that he left with Watson. The officer says he served the precept, "by leaving a true and attested copy of the same and return, with the within named Watson, as the law directs." What return did the constable leave? The return of his doings—of the service of the warning. Nothing else can be intended. Writs of summons are to be served by delivering the defendant or defendants, "a true and attested copy of said writ, with the officer's return thereon." Return of what? The statute does not say; but we all understand that it is the return of his doings—of the service of the precept.

2. We say it appears with sufficient certainty, that the return was on the copy left with Watson. The return says the precept was served "by leaving a true and attested copy of the same and return, with the within named Nathan Watson, as the law directs." The return, then, was on the copy left, for the law so directs. The presumption is, that every officer does his duty, until the contrary appears. It is certain, to a certain intent in general, that the return was on the "true and attested copy," left with Watson, and this is all the certainty the law requires in indictments. Co. Lit. 303. a. Arch. Pl. & Ev. 108. Arch. Crim. Pl. 17. And the court will not require a

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greater degree of certainty in this case, than is required in indictments. We maintain that certainty, to a common intent, is sufficient in this case. It is all that is required in ordinary pleading. It is a rule well settled, that, in pleas, the court will presume, in favor of the pleader, every proposition, which is by reasonable intendment impliedly included in the pleading, though not expressed. Arch. Crim. Pl. 17, 18.

In *Townsend v. Athens*, 1 Vt. Rep. 284, the court said, in relation to the service of the warning, "if the town of Athens have substantially complied with the requisitions of the statute, in the warning out of the pauper, they have, as a matter of right, thrown him upon Townsend." Athens relied upon a warning, with a return upon it, in the following words, viz:—

"Then served the within precept, by leaving a true and attest copy with the *with Jonas*, with my return hereon thereon indorsed."

In speaking of this return, Hutchinson, Justice, in delivering the opinion of the court, said, "that the bad spelling and failure in the return to say who served, and the defect of saying of what a copy was left, the court can supply by intendment. The officer, signing the return, shows who served the precept. The having served the precept, by leaving a copy, affords an intendment that he left a copy of the precept." This reasoning, when applied to the return in this case, answers all the plaintiff's objections and establishes its validity. Vide *Marshfield v. Montpelier*, 4 Vt. Rep. 284. *Shrewsbury v. Mount-Holley*, 2 Vt. Rep. 220.

The opinion of the court was delivered by

COLLAMER, J. This is a question upon the sufficiency of a warning-out process. Little aid can be derived from the cases cited in argument. These cases are mere *precedents*, and, to render them of force, the words must be the same and stand in the same connection. For instance, the case that decided that the preposition *with*, in the connection, in which it there stood, did not mean *within*, is an authority for no other word whatever. *Townsend v. Athens*, 1 Vt. Rep. 284. As *authorities*, these cases have no great importance, because they settle no *principle* of law. No doctrine can be extracted from them to construe other words, except the general doctrine, that such pro-

ceedings are open to objection, and the courts have adopted a strict construction,—in some cases more, in others less, rigid.

We are now called to pass on a set of words, on which there has been no decision. We shall endeavour to direct ourselves by the rule that, "certainty, to a certain intent in general," is sufficient. The rules of certainty, as drawn from Coke and preserved by the courts, are far from perspicuous, and their application far from *certain*. This, probably, arises from their being a specimen of the scholastic learning, which abounded in refined and obscure subtleties. The rule of certainty, mentioned, is the one ordinarily sufficient in law, and is Coke's second degree of certainty. This rule requires and means, "what, upon a fair and reasonable construction, may be called *certain*, without recurring to possible facts, which do not appear." 1 Chitty's Pleading, 237. It probably amounts to this; the writing should be such as would be understood to convey the meaning required to all men of ordinary discernment, alike. The faithful application of this rule would disabuse the law of much of the charge of useless refinement and subtlety.

The law requires these precepts to be served in the same manner as a writ of summons. Such writ is required to be served on the defendant, "by delivering him a true and attested copy of said writ, with the officer's return thereon." This means a copy of the writ and a copy of the return *on the writ*. The word, *thereon*, refers to the writ, not the copy. In this case, the return is, "I served this precept, by leaving a true and attested copy of the same, and return with the within named," &c. Now, could any two candid men understand this differently, or be, by possibility, misled? Would not all understand that he left a copy of this precept and *this return*. The word, *thereon*, is of no consequence, if it appear by the return, that a true and attested copy of the precept, and also a true and attested copy of the return, which the officer made on the precept, were delivered to the pauper. The only difficulty with this return, the only objection made to it, is, that it does not say *this return*. Can this word be understood or supplied by intendment? In the case, *Waterford v. Brookfield*, 2 Vt. Rep. 207, the return was, "I served this warning by leaving a true and attested copy, with, &c." without saying of what it was a copy. Hutchinson, justice, in delivering the opinion of the court, in that case, said, "It is objected that he says he left a copy, without saying of what.

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It is true, he does not say it expressly, but the intendment is so strong it cannot be misunderstood. "Served the warning by leaving a copy," cannot be supposed a copy of any thing except the warning. We got over an objection, exactly similar, in Windham County." There, the words, "*of this warning*," were supplied, as being clearly implied. Here, the officer returns, that he delivered a true and attested copy of this precept and return. This must intend *this* return.

To say it might be some other return, would be to adopt the rule, that it must be so certain, as to exclude every possibility to the contrary. Now this is to require "certainty to a certain intent, in every particular;" the highest degree of certainty, defined or mentioned in scholastic subtlety, confined to the refiners on the STAGIRITE, repudiated as early as Coke, and never required in pleading, except in two or three extraordinary cases. *Rex v. Horne*, Cowp. R. 682.

Judgment affirmed.

EMERSON & PETRIE v. NATHAN PAINE, Trustee of GEORGE PETRIE.Orange,
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A person, sued as trustee, may plead in bar that the person, as whose trustee he is sued, is not an absconding or concealed debtor, and a judgment, on such plea, is not open to review.

If a plea in bar is insufficient, or one, which the defendant has no legal right to interpose, it must be met by replication or demurrer. That the county court *received* such plea is no ground of exception or error.

This was an action on the act "directing the proceedings against the trustees of absconding or concealed debtors." The defendant filed a plea in abatement, alleging that the plaintiff, at the time of suing out this writ, also sued out another writ, on the same cause of action, against said George Petrie, (being a writ of attachment,) and that the same was duly served and entered with this writ, in this court, and was still pending. To this there was a demurrer. The county court overruled said plea. The defendant then filed his plea in bar, alleging that said George Petrie, at the time of the suing out and service of this writ, was not an absconding or concealed debtor. The plaintiff moved the court that said plea be not received, nor the plaintiff held to answer thereto; which motion was overruled by the court. The plaintiff then traversed said plea in bar, and, on trial, verdict and judgment were rendered for the defendant. Whereupon, the plaintiff prayed to be allowed his review to the next term, which was objected to by the defendant, and refused by the court. To which decisions of the court, in receiving said plea and refusing said review, the plaintiff excepted, and the cause passed to this Court.

W. Upham, for plaintiff.

The first question is, had the trustee, before disclosure and before any judgment that he was trustee, a right to plead in bar, that George Petrie, the principal debtor, was not a concealed or absconding debtor? The principal debtor might have interposed this plea, but we insist the trustee had not the right. He might have interposed the plea for the principal debtor, after having acknowledged that he had effects, and was trustee. He then could have made defence for the principal debtor. The trustee is summoned in, for the sole and only purpose of disclosing, whether or not he has, in his hands, the effects of the principal debtor. The first step he can take, after appearing in court,

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is to make his disclosure, and, if it appear that he has nothing in his hands, belonging to the principal debtor, he is dismissed, with his cost, and the suit is ended. If, however, he has effects and is adjudged trustee, he may be permitted to proceed further, and defend for the principal debtor. See statute 152, 183, Sec. 3. 7 Mass. Rep. 28.

The next question is, had the plaintiffs a right to review their case? We maintain that they had. The act of 1807 allowed an appeal in trustee suits, from the county to the supreme courts. Statute 155, Sec. 2. And we think all suits, that were appealable under the old system, are reviewable under the new.

We are aware of the decision, made by this court in the case of *Chittenden v. Bishop*, 5 Vt. Rep. 186, but we think this case distinguishable from that. In that case the court adjudged Bishop trustee, and he moved for a review, but the county court denied the right, and he took his exception. On the final hearing in this court, the decision of the court below was affirmed.

In the case at bar, an issue was formed to the jury, and, upon that issue, a verdict was returned for the defendant, Paine. The plaintiffs claimed their review, which was refused by the court.

By the act of 1797, the party had a right to review in all cases, with certain exceptions.

The act of 1824, p. 22, declares, "that either party may once, and no more, review his case to the next term of the county court." Why then had not the plaintiffs in this case a right to review their cause? The language of the act of 1824 is general, and embraces all civil cases, which can be tried by jury. Suppose the principal debtor had appeared and defended the case, upon its merits, and a verdict had been returned against him. Would he have a right to review? We think he would. If, then, we are right in the conclusion that the principal debtor would have a right to review, we see no reason why the trustee had not the same right. But the question is not, as to the right of the trustee to review, but as to the right of the plaintiffs in the trustee process. They, we insist, had a right, and the review should have been allowed.

L. B. Peck, for defendant.

I. The trustee had an undoubted right to appear and interpose the plea in bar. The plaintiffs had no right to call on him for a disclosure, unless the principal debtor had absconded, or was concealed, when they commenced their suit. It would be some-

what singular if the trustee could not require them to prove the existence of a fact, which, if disproved, would defeat the action. 2 Swift's Dig. 619. 5 Conn. Rep. 117. But, if Paine had no right to interpose the plea, the plaintiffs should have demurred. The question could not be raised on a motion to reject the plea.

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II. The court did not err in denying the review. This court have decided that the statute, giving the right of review, does not extend to a trustee suit. *Huntington v. Bishop*, 5 Vt. Rep. 186.

The opinion of the court was delivered by

COLLAMER, J.—The trustee interposed a plea in bar, that Geo. Petrie was not an absconding or concealed debtor. The county court refused, on motion, summarily, to dismiss this plea, to which the plaintiff excepts, as error. A court may, in pursuance of its own rules of practice, and in some cases, in its judicial discretion, refuse to receive a plea, but the refusal so to do, is in the mere exercise of discretion, and such a proceeding cannot be revised upon a writ of error, in the place of which the present proceeding is. By such a course the plaintiff is deprived of no legal right. If the plea was such, that, by law, the trustee had no right to interpose it, it should be shown by a replication, if additional matter was necessary, or it should have been demurred to. The plaintiff insists, that the trustee had no right to make this plea in his own behalf, but only in behalf of the principal debtor, after confessing himself trustee. The plea, on its face, purports to be the plea of the trustee, in his own right. If this is unauthorized by law, the plaintiff should have demurred. He would thereby have confessed nothing, as a demurrer only confesses that, which is legally pleaded. The plaintiff has traversed the plea, and, on trial, verdict and judgment were for the defendant. This is conclusive, and there is no error in the proceeding of the court. If the issue was immaterial, the correction must be by application for a repleader in the county court.

The court, however, are of opinion, that this was a legal plea. As a general rule, and at common law, a man can have no legal proceedings taken against him in relation to his debts and dealings, except by his creditor. This is a right and a privilege of no inferior importance. That a man should be called into court and there subjected to personal examination, upon oath, in rela-

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tion to his debts and dealings with third persons,—a proceeding, which even those third persons could not themselves take, especially in a court of law,—is not to be suffered but in case of imperative necessity, and by clear and express law. Our statute provides, “That if any person or persons shall have in his, her or their “possession, any money, goods, chattels, rights or credits of any “person, who shall have secretly absconded from this State, or “who shall keep concealed within the same, any creditor may “cause such person, having such goods, &c. to be summoned as “trustee,” &c.

The statute prescribes a form for the process, in which the plaintiff alleges, that the principal debtor is absconded or concealed, and that the trustee has effects, &c. and calls on him to answer, &c. This statute clearly interferes with the common law rights of the trustee, in many important particulars. It subjects him to the process of a stranger, with whom he has no privity. It calls him into court, when his creditor does not desire it. It subjects him to personal disclosure. It enables the court, on that disclosure and other evidence, to give a judgment against him, without the intervention of a jury, and from this judgment there is no review or appeal. *Huntington v. Bishop*, 5 Vt. Reports, 186.

It is not to be supposed this was intended to be done, but in a case of real necessity, such as is clearly within the statute. The statute, very clearly, subjects no man to this, but in the case of an absconding or concealed debtor. The right to call on a man, as trustee, even for a disclosure, by the statute clearly depends on the fact, that his creditor has absconded, or is concealed. This is a prerequisite or condition precedent to sustaining the action against any one.

To hold otherwise, would subject every man to the suit and interrogation of any one, who had sufficient curiosity or impertinence to investigate his dealings with his neighbors. It would, in effect, introduce the Massachusetts practice of sustaining this species of proceeding against any man, as the trustee even of his resident neighbors. This we consider, not warranted by our statute, and contrary to the well known will of our legislature, which has been often applied to, to extend the process to such cases, and has uniformly refused. It is said the principal debtor may make this same plea, but his neglecting or refusing does not deprive the trustee of so doing. We consider the Con-

necticut practice, on this point, most consistent and correct under our statute.

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Was the plaintiff entitled to review? This is an *action*, as at common law, against the principal debtor, and as to him, and on all proper issues by him made, or made for him by the trustee, after acknowledging that relationship, according to the statute, either party is entitled to review. As to the trustee, it is a proceeding to hold a debt, or it is the attachment of a debt. This is entirely a proceeding created and wholly regulated by statute. As to the trustee, it is a proceeding collateral and auxiliary to the action against the debtor, rather than an *action* against himself. As to him, there is no review. This was so decided in *Huntington v. Bishop*, and that was a plea by the trustee in his own right. This disposes of the case for the defendant and renders it unnecessary to pass on the plea in abatement.

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Judgment affirmed.

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JAMES BAXTER v. SOLOMON WILLEY.

The sale and conveyance of real estate, in payment of a pre-existing debt, with a simple right of repurchase on the part of the debtor, is valid, and is not a mortgage, even in equity.

But, in such contract, it is essential that the debt be extinguished absolutely, *in presenti*.

If the object of the contract be to *secure* the payment of the debt, and not to *extinguish* it, except upon the happening of some subsequent event, or the default of the debtor to pay by a given day, the transaction is a mortgage, and no form of words will enable the parties to foreclose the debtor's equity of redemption.

If such contract be made in a foreign country, the creditor will not be permitted to pursue his debt here, unless it is shown, that, by the law of the place of contract, the debtor will be considered as having an equity of redemption in the land.

At law, the conveyance of land, agreed to be received in payment of a pre-existing debt, although the securities are not surrendered, there being no defeasance under seal, passes the absolute title to the estate.

This was an action of assumpsit upon a promissary note, submitted to the county court upon the following case stated :

"In this case, it is agreed by the parties, that the defendant executed to the plaintiff the note declared on, at the time it bears date, and that, at the same time, upon a conference between them, in relation to their concerns, both parties then being in Lower Canada, this, with two smaller notes, then due to plaintiff from defendant, was cast, and the amount due on all three ascertained;—that, at the same time, defendant gave to plaintiff a deed of a piece of land in Canada, but did not take up the notes; that plaintiff then gave a writing to defendant, under his hand, stating that defendant had deeded to plaintiff a piece of land, in payment of three several notes, which notes were described in said writing, one of which was the note now in suit. But said writing further stated that plaintiff agreed, if defendant would pay him such sum as was then found due, as above, upon said three notes and interest, at the end of two years, plaintiff would redeed said land to defendant. Said writing was afterwards sold to one Berry, for \$35, and said Berry afterwards sold said writing to a third person, and it is since lost. The defendant was to hold possession of the said land, till the end of the two years. And it is further agreed, if the court consider the evidence admissible, the said Berry will testify, that, in 1832, he called on

"plaintiff to make inquiry about the land above deeded, by defendant to plaintiff, and, in a conversation then had with plaintiff about the notes and land, plaintiff told said Berry that he had received his pay for the notes of defendant, in land, and that nothing was due from defendant to him, on said notes. Now if the court, on this statement of facts, shall be of opinion that the transaction, above stated, should have the effect of a mortgage, judgment is to be rendered for the plaintiff, for the amount due on this note and cost. But if the court should be of opinion, on the whole case, that such was not the legal effect of said transaction, and that said notes have been paid;—then judgment is to be entered for defendant for his costs."

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The County court rendered judgment for defendant, plaintiff excepted to that decision, and the case came here for revision.

Elijah Farr and Wm. Upham, for plaintiff.

The conveyance from Willey to Baxter was in the nature of mortgage to secure Baxter's debt against Willey, and the parties so intended it.

A conveyance of real estate, intended by the parties merely as security for a debt, though absolute on the face of it, is a mortgage; and any agreement, on a subsequent event, to change its nature, and prevent the equity of redemption, is void. *Henry v. Davis*, 7 Johns. Ch. Rep. 40. *Bloodgood v. Zeily*, 2 Caines' Cases, 124. *James v. Johnson*, 6 Johns. Ch. Rep. 417. *Hughes et al. v. Edwards et ux*, 9 Wheat. 489. *Thompson v. Devenport*, 1 Wash. 125. *Kelleran v. Brown*, 4 Mass. Rep. 443. *Young's administrator v. Purvises*, 2 Hayward, 26. 3 Desau. 114. *Clark v. Henry*, 2 Cowen's Rep. 324. *Wheeler v. Swartz*, 1 Yeates' Rep. 584.

A. Underwood, for defendant.

How a court of equity in Canada, (if there be one,) might view the transaction, as set forth in the case stated, it is unnecessary to inquire, as the court must decide the question raised, according to the established rules of law in this State; and the question is, did the parties intend the deed of the land a payment of the notes, reserving to defendant the privilege to re-purchase, in a given time, at a given price; or did they intend it as a mere security for the payment of the notes?

In Kent's Com. 4th vol. 142, it is said, "in equity the character of the conveyance is determined by the clear and certain in-

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tention of the parties, and such intent will be carried into effect, whether it be a security for re-payment of money, or a contract for re-purchase."

In this case, the defendant insists, that the parties intended the deed as a payment of the notes; and it is believed, that even a *court of equity* could come to no other conclusion upon the facts; much less a court of law. No other intent can be gathered, by any legal or equitable construction of the writing, given by plaintiff to defendant.

The plaintiff acknowledges the receipt of the deed, not as security for the payment of the notes, but in payment of the notes, (describing them.) The language is unequivocal, explicit and not to be misunderstood. Why the notes were not taken up does not appear. They might have been lost, mislaid, or left through negligence or mistake. It was sufficient for defendant, however, that he held plaintiff's discharge or acknowledgment of payment. The writing is not, that plaintiff would re-deed *on payment of the notes and interest* in two years, but on the payment of *such sum*; or rather, *if* the defendant would pay the plaintiff—not the *notes*—but, *such sum* as was found to be due on the notes, at that time, with interest in two years, then, plaintiff agreed to re-deed. It was not binding on defendant to re-purchase, but left optional. The time was limited to the *end of two years*, and it is manifest that both parties understood and meant, that, unless defendant elected to re-purchase, by that time, the land was gone forever in *payment* and without right of redemption. Plaintiff so understood it, and if his subsequent declaration to Berry is to be admitted as evidence—and which would be admissible in a court of equity, (*Campbell v. Worthington*, 6 Vt. Rep. 448,) all possibility of doubt is removed.

The writing is to be interpreted according to established rules of construction in courts of law. The words, made use of, are to be understood according to their common acceptance. If plaintiff has received land in payment, it would be doing violence to language, to say it meant *security* for payment. The court would seem to be—not carrying into effect the *intent* of the parties—but making a different contract, by giving the word any other than its obvious meaning.

It appears that *there was no loaning of money at the time*, by plaintiff to defendant, but a pre-existing debt. The defendant proposes to pay in land, with the additional agreement,

however, that, if at the end of two years, he should elect to re-purchase at a given and stipulated price, he should have the privilege so to do ;—the plaintiff assented to this, took the deed and gave the writing to that effect. Had the parties designed the transaction a mere security, the writing would have been framed accordingly. The plaintiff, instead of saying he had received the deed in *payment*, would have acknowledged the receipt of the deed as *security* for the payment of the notes.

The opinion of the court was delivered by

REDFIELD, J. The contract here sued was made within the province of Lower Canada, and was there to have been performed. No principle is better established, perhaps, than that the nature, construction, validity, performance, release and discharge of a contract is to be determined by the *lex loci contractus*, unless the contract is made with reference to performance in another place, in which case those incidents will be subject to the law of the place of performance.

The provinces of Canada, it is well known, although dependencies of the British Crown, are not governed by British laws, so far as civil proceedings are concerned. It was one of the conditions of the surrender of those provinces by the French, that they should be permitted to enjoy, in perpetuity, French law, unless repealed or modified by their own legislature. This has not been done, except to a very limited extent. The French civil law, as it existed at the time of the cession, still obtains there, in all its original rigor and rudeness and with all its inequalities and imperfections. It is the *coutume de Paris*, without any of the qualifications, and manifest meliorations and improvements of the code Napoleon. It is, in short, the civil law of Rome, substantially as found in the Pandects. They have no courts of chancery and their courts of law exercise equity powers only to a very limited extent, and this chiefly in cases where such powers have been conferred by express statutes. These statutes are almost all limited to some short term of years, and, in the present perilous times, the chance of their being renewed is not a little precarious. Hence, this case must be here decided, so as to make the parties safe. And this safety, must of necessity, be in some degree measured by the laws, and the constitution and manner of proceeding in the courts of Canada. For the land being there situated, the *lex rei sitæ* must determine the title to it. The contract, in terms, is an absolute conveyance of the land

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to the plaintiff, "*in payment*" of this note, with the right of defendant to repurchase, upon payment of the amount of the price agreed, and the interest. This note, with others, was due plaintiff from defendant, sometime previous to the conveyance of the land, and was not surrendered by plaintiff, but retained. This, with other circumstances, might enable a court of equity to treat the transaction as substantially a mortgage, and allow the defendant an equity of redemption. And if so, the plaintiff would be entitled to sue upon his notes. If the land were situated here, we should probably be inclined so to treat the case.

For if the real object and intention of the parties was to *secure* the payment of the debt, and not to *extinguish* it, no form of words will enable them, upon the happening of any subsequent event, or any default on the part of the debtor, to foreclose his equity of redemption, but with us, any such contract is absolutely void. This is, indeed, a principle of chancery jurisdiction, and not of courts of law, as such. *Hughes v. Edwards*, 9 Wheaton, 489. *Henry v. Davis*, 7 Johns. Ch. Rep. 40. It is well settled that a court of equity will treat every contract for the security of a debt, by conveyance of real estate, although not evidenced by any written defeasance, but resting wholly in parol, as a mortgage. *Campbell v. Worthington*, 6 Vt. T. 448. But, at law, such conveyance vests the absolute title in the grantee, unless the defeasance is under seal. *Kelleran v. Brown*, 4 Mass. R. 443. And if, on a sale of land, there be a *bona fide* condition of repurchase or avoidance of the sale, it is valid, but if the debt be not *extinguished in the present tense*, it will be treated in equity as a mortgage. *Ibid.* *Conway's Executors et al. v. Alexander*, 7 Cranch. 218.

If the land in question, in the present case, were within our own jurisdiction, so that the defendant's equity of redemption could be secured to him, by our sustaining this suit, we should, doubtless, be inclined to do so. But it must, *ex necessitate*, pertain to every jurisdiction, to determine exclusively all questions pertaining to the title of real estate, and unless we could feel sure that the courts in Canada will permit the defendant to hold an equity of redemption in the land conveyed to plaintiff, it would be unjust, in the last degree, to permit the plaintiff here to take judgment, which might result in compelling the defendant to pay the price of the land, without the possibility of ever reclaiming the same.

within each jurisdiction

We have no doubt that, in Canada, this would be treated as an absolute conveyance in payment of the debt, and that defendant had, at most, a right of repurchase, which was lost by lapse of time. And had the transaction occurred here and the notes not been retained by plaintiff, we should so view it.

The judgment of the County Court is, therefore, affirmed.

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WASHINGTON COUNTY.

MARCH TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.
 " STEPHEN ROYCE,
 " SAMUEL S. PHELPS, } *Assistant Justices*.
 " JACOB COLLAMER.

Washington. ARAUNAH SPEAR, Administrator of F. ALEXANDER v. WILLIAM DITTY.
 March,
 1837.

A Collector's advertisements of particular land taxes must be signed by him, as collector.

This was an ejectment for land in Roxbury. On trial, the plaintiff showed title to the land in his intestate, his own letters of administration, and eviction by the defendant. The defendant claimed title by virtue of a vendue deed from E. Spaulding, as collector of a land tax, assessed on that town, by an act of Oct. 1831. From the record of the proceedings of said collector, under said act, it appeared that his advertisements, as inserted in the newspapers, were not signed by him, as "Collector," but with his name only. For this and several other causes, objection was made by the plaintiff. A verdict was taken for the defendant, under a rule, entered by consent of the parties, that, if the Supreme court were of opinion, that said proceedings and

deed did not show title in the defendant, judgment was to be entered for the plaintiff.

L. B. Peck, for the plaintiff.

The vendue title, under which the defendant claims, is defective. The collector should have signed his advertisements, in his official capacity. The form, given by the statute, and the reason of the thing require this. Even a public and known officer, when in the discharge of his official duty, must so sign. *Middlebury College v. Cheney*, 2 Vt. Rep. 220. *Lessee of Willieck v. Miles*, Peters' C. C. Rep. 429.

S. B. Prentiss, for defendant.

The form, prescribed by the statute, must be followed in every essential particular, but it is not every deviation or omission of a word, or a letter, which will vitiate. It sufficiently appears, from the whole advertisement, that Spaulding was collector. He undertakes to do what no other but a collector, by law, can do. In the records it appears he was collector, and by the records it also appears, that the advertisements were headed "collector's advertisements." *Shrewsbury v. Mount Holly*, 2 Vt. Rep. 220.

The opinion of the court was delivered by

COLLAMER, J.—It has long and repeatedly been holden, both by the Supreme Court of this and the United States, that sales for land taxes are proceedings *in invitum*. It is a mode of transferring title by operation of law, without the agency of the owner, and is also in the nature of a forfeiture, and, therefore, the proceedings are, as conditions precedent, to be strictly, perhaps literally, followed.

The statute requires that the committee, appointed by the particular act, assessing the tax, should advertise and give notice, in a certain manner, to the owners of the lands, of the time when the tax may be paid by labor on the roads, which it was assessed to build or repair. Those, who are delinquent of payment, in this manner, are to have notice, by advertisement in certain papers, of the time when they must pay the collector, and that, on default thereof, the land will be sold. For this latter advertisement a form is prescribed by statute, which, it has been decided, must be strictly followed; as the owners of the land are generally non-residents, and are wholly dependent on this publication for notice. This it requires the Collector to do, and in the form it is required to be signed "*collector*." Clearly, this is

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an official act, and it is difficult to see how any one can act officially on paper, and not so state on the paper. The act, assessing this tax, was a private act. The advertisement, in this case, was not signed by Spaulding, as collector, nor did it any way so import, and the land holders were, therefore, no way informed that the signer of that advertisement had any more right, than any other man, to give such notice, nor that, if he had such power, he undertook to exercise it. It is not true that every man is to be presumed to be clothed with and to be exercising an official capacity, because it seems to be needed for what he is attempting. Such a principle would sweep away all official signatures and designations.

It is said the record of the town clerk shows that Spaulding acted officially, and that his advertisements were headed "Collector's advertisements." It must appear *on the publication*, by what power and in what capacity the person acts, and this cannot be supplied by the town records. It does, indeed, appear that the town clerk, in recording the advertisement, headed his record thus—"Collector's advertisements," but nothing of that kind was on the publication.

Judgment Reversed,

And, agreeably to the rule, and by consent of the parties,
Judgment rendered for the plaintiff.

THOMAS REED, JR. v. DANIEL WOOD, JR.

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1837.

Where, on the sale of articles of personal property, a sale note is given, describing the property sold, and receipting the price, but containing no warranty: *Held*, that the purchaser could not give *parol* evidence to prove a warranty.

This was an action of *assumpsit* on a note, made by the defendant, payable to Samuel Train & Co. or order, and by them indorsed to the plaintiff. The defendant pleaded in offset a claim for damages, against the said Train & Co., upon a warranty of a portion of the hides, the sale of which formed a part of the consideration of the note in suit. The defendant, in support of his claim, shewed a bill of sale of the hides, in the ordinary form, and containing no warranty of quality. He then offered the deposition of Hugh McNice, who deposed that he was present at the purchase of the hides in question;—that they were in a package and lashed together with a rope;—that said Train & Co. would not allow the package to be opened, but represented it to be a lot of good hides, and that, upon being assured they were good, the defendant concluded to take them. The deponent further stated that, afterwards, upon opening the package, the hides proved to be so injured as to be worthless.

Upon this testimony the county court directed a verdict for the plaintiff, under a rule, that, if this court should be of opinion, that it was competent for the defendant to prove an express warranty, separate and apart from the written bill of sale, and the deposition had any legal tendency to prove such a warranty, the plaintiff was to become nonsuit—otherwise, the judgment of the county court to be affirmed.

J. Bell and Wm. P. Briggs, for defendant.

I. It was competent for the defendant to show a partial or an entire failure of consideration, or fraud in the payees, and the evidence of McNice shows both.

II. The bill of sale, so called, is to be treated as a mere memorandum of quantity and price and receipt of payment, and not as a written instrument, embracing the whole contract between the parties. 3 Starkie's Evidence, 1049, in notes. *Jeffrey v. Walton*, 2 Com. Law Rep. 385. 3 Starkie's evidence, 1054, and note.

III. The warranty of the hides was an independent, collateral fact, having no connection with the number or price of the arti-

Washington, cles, and it neither contradicts nor explains the bill of sale. 3
 Marsh, Dane's Dig. 486, and the authorities there cited. 1837.

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T. H. & H. H. Reed, for plaintiff.

No proof of a warranty, separate from the bill of sale, was admissible ;—

I. Upon the general principle of law, that a written contract cannot be varied or enlarged by parol evidence. 3 Wils. Rep. 275. 2 Day's Rep. 137. 11 Johns. Rep. 375. 3 Term Rep. 590. 1 Mass. Rep. 510. 8 id. 375. 2 Bos. & Pul. 565. 8 Johns. Rep. 189. Peake's evidence, 112.

II. Upon authorities directly applicable to the case at bar.

"Where the contract of sale is reduced to writing by a bill of sale, no action will lie on a parol warranty, made at the time." *Mumford v. McPherson*, 1 Johns. Rep. 414. *Reed v. Van Orstend*, 1 Wend. Rep. 424. *Wilson v. Marsh*, 1 Johns. Rep. 503. *Vandervoort v. Smith*, 2 Caines' Rep. 154-55.

"Where a contract is entered into for the sale goods, and a bill of sale is afterwards executed, the bill of sale is the only evidence of the contract, which can be received; and parol evidence of the agreement cannot be received, even though the written instrument be inadmissible for the want of a stamp." 3 Starkie's evidence, 1005-6.

Should the court be of opinion that we are wrong in the position taken, then another question arises in the case, viz: whether the deposition of McNice proves a warranty, by Train & Co. to Wood, of the hides in question? We maintain that it does not:

I. Because the words he testifies to, as having been used by Train & Co., in the negotiation with Wood, do not express a warranty, and

II. Because, from the nature and terms of the negotiation, as detailed in the deposition, it does not appear, nor can it be inferred, that Train & Co. *intended*, or that Wood understood at the time, there was a warranty, and, without this *intention* and mutual *understanding*, there could be no warranty, whatever the words used might have been.

Justice Kent says, in giving the opinion of the court in *Sci-xas v. Wood*, 2 Caines' Rep. 55, "to make an affirmation at the time of a sale, a warranty, *it must appear by evidence to be so intended*, and not a mere matter of judgment.

So in *Swett v. Colgate*, 20 Johns. Rep. 196, Justice Wood-

worth remarks, in giving the opinion of the court, "that there are no particular words prescribed by law, to make a warranty ; but it is essential that the affirmation, made at the time of sale, be *intended* by the parties, as a warranty, and *this must appear by the evidence* ; if it does not, the affirmation is considered as a mere matter of judgment."

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And to the same effect are the following authorities : 2 Cowen's Rep. 138. 3 Term Rep. 57. 4 id. 142. 19 Johns. Rep. 290.

The most, that can be rationally gathered from the deposition, is, that Train & Co. expressed an opinion that the hides were good, without knowing, or having the means of knowing, any thing more of their quality than Wood, the purchaser, did, and it is well settled, that this does not constitute a warranty in the sale of any article. *Davis v. Meeker*, 5 Johns. Rep. 354. *Holden v. Dakin*, 4 do. 421. *Wilson v. Marsh*, 1 do. 503. 3 T. Rep. 57.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—It is a rule well settled, that a warranty of the quality of personal property sold must be made at the sale ; that if made either before or after, no action can be maintained thereon. It is also a familiar principle, that no parol evidence is admissible to vary, or alter a written contract, or to add a new stipulation or condition thereto, when the parties have reduced their contract to writing. Neither can the parties give parol evidence of such contract, although the written contract may be inadmissible in evidence, for want of a stamp. Whenever there is a sale, and either a bill of sale or a sale note given, such bill or sale note is the evidence of the contract, and cannot be varied. The cases of *Hodges v. Drakeford*, 1 New Rep. 270, *Rolleston v. Hibbert*, 3 Term Rep. 406, *Gardiner v. Gray*, 4 Camp. 144, fully establish this principle. The bill, executed by Train & Co. to Wood, in January, 1832, was a sale note, or bill of sale, and, as such, evidence of the contract. It described the property sold ; that it was bought by Wood of them, and they had received their pay therefor. It was the proper and legitimate evidence of the sale, and of the terms and conditions thereof. If a warranty of the quality of the property, then sold, had been contemplated by the parties, it should have been inserted in the writing then executed. To admit parol evidence of a warranty, would in effect be to require that one

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part of a contract should be proved by the writing, which was executed, and to permit another, and an essential part of the same contract, to be proved by parol. This, we think, could not be permitted, and the result is, that it was not competent for the defendant to prove an express warranty, by the deposition introduced. The court, therefore, correctly directed the verdict to pass for the plaintiff.

It is unnecessary to pass upon the other question, any further than to say, that the declaration, in effect, was not framed to meet any evidence of a deceit in the sale of the hides, nor do we see any thing in the deposition, tending to prove either a deceit, or a fraudulent representation, or any thing more than an assertion of the belief of the defendant, as to the quality of the articles sold. If it was intended the vendor should be responsible for the goodness or quality of the articles sold, a warranty should have been required and given; and, none such having been given, it is very evident that none was intended. The judgment of the county court must, therefore, be affirmed.

STATE TREASURER v. LUTHER CROSS & IRA DAY.

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A subscription, by which the subscribers individually promise to pay the Treasurer of the State the sums annexed to their names, toward building a State House, is not void for want of consideration, or as against public policy.

A suit may be brought on such paper, in the name of the Treasurer.

It is no defence, in an action on such paper, that the whole sum subscribed exceeded the amount to be raised, but the subscription should abate *pro rata*.

This was an action of assumpsit upon a subscription paper, for the purpose of building a new State-house in the town of Montpelier. The general issue was pleaded and joined to the court.

The plaintiff, to support the issue on his part, introduced testimony to show that the State-house, heretofore occupied in the town of Montpelier, was in a dilapidated condition. That, at the session of the legislature, in 1831, a resolution was passed, appointing a committee to receive proposals for building a new State-house. The plaintiff also introduced the subscription paper, which is signed, among others, in the name of Luther Cross & Co. and the sum of \$1000, annexed to said name, and also introduced testimony to show that Luther Cross signed the said paper, in the name of said firm, and affixed said sum thereto, and that he had authority from said Ira Day, his partner in trade, under said firm, for so doing, and that said Cross & Day jointly paid \$490, towards the first instalment, on said paper. The plaintiff also introduced an act entitled "an act authorizing the building of a State-house in Montpelier," passed Nov. 8, 1832, the first section of which appropriated the sum of \$15000, "for the purpose of erecting a new State-house at Montpelier, *provided*, the inhabitants of Montpelier, or any individuals, shall, before the first day of January, 1833, give good and sufficient security to the treasurer of this State, to pay into the treasury of the State the sum of \$15,000."

It was also shown that, pursuant to the provisions of said act, a committee of signers to said subscription paper gave security to the State Treasurer, that the amount of \$15000 should be paid into the State treasury, to be expended in erecting a new State-house—and that the State had caused to be erected, in Montpelier, a durable State-house, at an expense of about \$100,-

Washington, 000—and that the defendants had refused to pay the balance of their said subscription.

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The defendants, to support the issue on their part, introduced evidence to show that said committee of subscribers, on or about the 8th day of November, 1834, paid to the plaintiff the balance, that then remained unpaid, of said sum of \$15,000, in discharge of the security said committee had given, as aforesaid,—that about \$16,000, of available subscriptions, were contained in the paper signed by the defendants, including the defendants' subscription, and that, since the payment made by the said committee, as aforesaid, enough had been collected of the subscribers, other than the defendants, to re-pay the sum paid out by said committee, and leave an excess of three or four hundred dollars.

The plaintiff, to rebut the defence set up by the defendants, proved that the condition, on which each subscription was made, was, that the agents for procuring the subscriptions should procure as much subscribed as they could, and that each subscriber should be entitled to receive back his ratable proportion of whatever excess should finally be realized, over said sum of \$15,000, and that the said subscribers are now prosecuting this suit for their own benefit, with the consent of the said State Treasurer. Upon these facts, the court rendered judgment for the plaintiff, for the balance of the defendants' subscription, deducting their proportion of the excess of the available subscriptions. To which decision the defendants excepted, and the case comes here for the revision of this court.

L. B. Peck, for defendants.

1. There is no sufficient consideration for the defendants' promise; it is a mere *nudum pactum*. *Essex Turnpike Co. v. Collins*, 8 Mass. Rep. 292. *New Bedford Turnpike Co. v. Adams*, id. 138. *Philips' Limerick Academy v. Davis*, 11 id. 113. Com. Dig. Tit. action upon the case upon assumpsit. F. 8.

2. The subscription ought not to be supported. It was no less than purchasing of the legislature the location of the State-house. It was holding out to that body a pecuniary consideration for the passage of a law on a subject, in which all the inhabitants of the State were equally interested. Public policy would seem to be opposed to the legality of such a contract. Had an individual promised another that he would pay him any

given sum, provided he would procure the passage of a law, locating the State-house at this place, such promise would be *void*, and no court would enforce it. To this point it must be unnecessary to cite authorities. Ought not this principle to apply, when the contract is made with the government itself? And from what source, it may be asked, does the government derive the power of making such a contract?

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3. This suit could not be sustained in the name of the Treasurer, if the money, when collected, belonged to the State. The Treasurer is a mere agent, and the suit should have been brought in the name of the State. Our statute, authorizing certain suits to be brought in the name of the Treasurer, cannot be extended to this case. It is not a debt due the State, within the meaning of that statute. 1 D. Chip. Rep. 295, 431. 9 Conn. Rep. 267. 1 Mass. Rep. 208. 6 id. 253. 9 id. 272. 10 Johns. Rep. 387. 1 T. Rep. 172, 674. 3 B. & P. 147. 3 B. & B. 275.

4. This suit was avowedly brought for the benefit of the other subscribers, to compel a contribution from the defendants. It cannot be sustained for this purpose. If they have any remedy, it must be sought in some other form of action. *George et al. v. Harris*, 4 N. H. Rep. 538.

O. H. Smith, for plaintiff.

By the 18th section of the act, (Comp. laws, p. 552,) it is provided that all suits are to be prosecuted "in the name of the people of the State of Vermont, or *in the name of the treasurer thereof*." The argument that the contract, contained in the subscription paper and signed by the defendants, should not be enforced, for the reason that it is against public policy, is too fine-spun to merit much consideration. By the erection of such a new State-house, as was contemplated in the contract entered into with the State, by the defendants and others, the seat of government would be permanently established in Montpelier, and the interest of those, residing or owning real estate in the immediate vicinity, would be greatly advanced, by a rise in the value of their property, while those, living more remote, would derive no benefit whatever. Would it be just to say that those, living in the immediate vicinity, should pay no more than those living in the remotest part of the State? If, in justice, those, who derive an essential benefit, should pay more, it would be difficult to point out wherein the impolicy consists, in enforcing

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an agreement, by which they voluntarily contracted to pay more. Until the defendants can show that it was unjust to establish the seat of government permanently at Montpelier, by the erection of a durable building for a State-house, we shall take it for granted, that sound policy requires that the present contract should be enforced, as it is just and equitable, and was entered into voluntarily, for a valuable consideration.

The main question, in the case, is, whether the payment, made by the committee in discharge of the security they had given the Treasurer, can enure to the benefit of the defendants, and operate as a payment of their subscription, so as to drive the subscribers to bring their separate actions for a contribution.

It is a well settled principle, that the surety, on paying the debt of the principal, is entitled to be put in the place of the creditor, and may avail himself of all, or any of the collateral securities, means or remedies, which the creditor has for enforcing payment against the principal, and may have them assigned to him. 4 Vt. Rep. 599. 4 Johns. Ch. Rep. 130. 10 Johns. Rep. 524.

It was determined in the case of *Allen v. Holden*, 9 Mass. Rep. 133, that a judgment is not discharged by payment of the amount of it, by the officer, who has become liable to the creditor, in consequence of his neglect to serve the execution, but an action may, afterwards, be maintained upon the judgment, with the creditor's consent, for the benefit of the officer. Although no case has been reported in this State, which adopts the law in this case, still it is well understood to have been sanctioned by repeated decisions in the county court.

If three persons own goods jointly, and agree to an auction sale, upon credit, with notes payable to bearer, and agree that a disinterested person shall be the bearer and collect and pay over, and one of the owners becomes a purchaser and gives such a note, the person agreed upon as bearer can recover at law, in a suit on the note, for the reason that, by the agreement, the legal interest and right to recover the money is vested in him, and when collected he will hold it in trust. *Smith v. Burton*, 3 Vt. Rep. 233. *VanNess v. Foust*, 8 Cranch. 30.

The opinion of the court was delivered by

WILLIAMS, Ch. J. This is an action brought to recover the sum, subscribed by the defendants, towards building a state-house in Montpelier. The subscription paper contained a contract be-

tween the state and the individual subscribers, and, if liable to none of the objections, which have been urged, must be enforced. Here were parties *in esse*, capable of contracting. If the subscription was made before the passing of the act of the legislature in 1832, it was in the nature of a proposition to the state, that the several subscribers would pay the several sums annexed to their names, if the state house should be erected in Montpelier. If made after the passing of the act, it may be considered as accepting the proposition, emanating from the legislature, in the providing clause of the first section of the act, and providing the funds for that purpose. In either event, when the terms of the act were complied with, the contract between the state and the subscribers was mutual and equally binding. From the decision of the court in the case of the *University of Vermont v. Buell*, 2 Vt. Rep. 48, it appears that such contracts are not void, for want of a consideration; and it is to be observed that all the cases from Massachusetts, which the defendants have read, were before the court on the hearing of the case against Buell.

Of the propriety of a contract of this kind, between the state and individuals, it does not become us either to inquire, or express an opinion. The doings of the legislature, when not liable to constitutional objections, are to be respected by the other branches of the government, and their wisdom or propriety are not to be questioned by a co-ordinate branch. The propriety of any particular location of public buildings may depend, in some measure, upon the sum proposed to be given by the citizens of any place. The public interest obviously requires that such location should be made with a view to all the circumstances, and the greater or less burthen to the whole State would be an important circumstance to be taken into consideration, in determining between several places, in other respects equally convenient. The increased value of the property, in the vicinity of public buildings, would seem to require that those, who are benefitted, should contribute some part of this increase, for the purpose of erecting them, rather than that the whole advantage should accrue to them, and the expensé be wholly borne by the citizens generally. We can see no foundation for the objection made to this subscription, on the ground of public policy or propriety.

That the action may be brought in the name of the Treasurer, appears from the 18th and 19th section of the statute constituting the treasury department. It is a suit for money due on

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Washington, simple contract, and, by that statute, may be brought either in
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It only remains to consider the defence relied on by the defendants; and we are of opinion, that it cannot avail them, either that the committee of the subscribers paid to the State the whole sum of fifteen thousand dollars, which they had secured, or that the sum, collected by the committee of the other subscribers, was sufficient to repay the sum by them actually paid over. The payment made by the committee was not a payment made by the individual subscribers. The claims of the State may have been satisfied by the payment of the bond, but the subscription was, both before and after that payment, held by the committee, as in trust for the benefit of the signers of the bond. The cases are numerous, where a debt or claim has been paid to the creditors, and the securities kept alive for the benefit of others interested, and suits have been maintained on those securities. If a judgment is rendered against a sheriff for an escape, the judgment against the debtor is frequently, by order of court, assigned to the sheriff. *Oliver v. Chamberlain*, D. Chip. Rep. 41. The principle was recognized in the case of *Allen v. Holden*, 9 Mass. Rep. 133. Further, from the nature of the subscription it is very apparent, that the defendants could not resist the action, on the ground that the committee had already collected of the subscribers the whole sum, for which the bond was executed. Each subscriber agreed to pay a definite sum, and if the aggregate exceeded the amount required, the subscriptions should abate, *pro rata*, and no one subscriber could have the whole benefit of the excess. The agreement among the subscribers, to this effect, was only what the law would have enforced without such agreement, in case the subscriptions exceeded the amount required. The result is, there is no legal objection to the right of the plaintiff to recover of the defendants on the subscription paper, after deducting their proportion of the excess of the available subscriptions, either arising on the contract itself, or on the facts given in evidence by the defendants; and the judgment of the county court, which was conformable to this view, must be affirmed.

M. & P. HUTCHINS v. SAYLES HAWLEY & WILLIAM N. PECK, Washington,
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Trustees of J. & M. GREENOUGH.

Where H. executed a note to G., which G. sold to P. and received the amount, of which P. immediately gave notice to H.: Held, that H. could not be held as the trustee of G., on the ground that the sale of the note to P. was done with the intent to enable G. to abscond, and thereby defraud his creditors. The question of fraud cannot be tried between two trustees upon their own disclosure: and there is no provision for trying such question by the trustee by jury. Also held, that, to constitute one trustee of another, he must be indebted or hold property in trust, and as neither H. nor P. were indebted to G., nor was the note, or the amount due them, holden for his benefit in any way, they could not be adjudged his trustees.

The plaintiffs were creditors of the Greenoughs, and, as such, brought this suit. On the trial in the County Court, it appeared that Hawley had made his note to the Greenoughs, and that, before the commencement of this suit, they had, for a valuable consideration, assigned it to Peck, and with a full knowledge on the part of the latter, that they intended to abscond and leave their debts unpaid, and that they made the assignment to obtain money, for that purpose. Peck, however, had no knowledge of this particular debt. Upon these facts, the County Court adjudged that Hawley and Peck were, neither of them, trustees.—Plaintiffs excepted, and the case passed to this court, for revision.

L. B. Peck for the plaintiffs.

The sale of the note, although made on good consideration, was not made *bona fide*. The assignee, at the time of the purchase, had full knowledge that the assignors were about absconding to evade the payment of their debts, and wished to raise the money on the note, to aid them in their flight. The direct effect of the assignee's conduct was to defeat creditors. It not only placed the note in question beyond their reach, if the sale is allowed to stand, but it enabled the debtors to withdraw their persons from the reach of process. It would be monstrous, under such circumstances, to support a contract, so palpably injurious to creditors. Cowp. 434. 1 Burr. 474. 4 Doug. 86. 1 Swift's Digest 86. *Edgell v. Lowell et al.* 4 Vt. Reports, 405.

That the note was a mere *chose in action*, and not liable to be seized on mesne or final process, does not alter the case. Our statute against fraudulent sales extends to, and makes void, a

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 fraudulent assignment of a *chose in action*, as well as a sale of any other species of property, made to defeat creditors. This subject has frequently been before the courts in the neighboring States, and whenever the assignment has been proved fraudulent, as against creditors, the trustee has invariably been held liable to the creditor, in this form of action. 4 Mass. Rep. 508. 13 id. 215. 16 id. 318. 4 Pick. 503. 9 id. 435. 3 Conn. Rep. 27. 4 N. H. Rep. 469. 5 Johns. Rep. 239.

A. Spaulding, for defendants.

Was the notice sufficient?

Upon this point there can be no doubt. See Rev. statutes 144.

A creditor cannot, in legal contemplation, be defrauded by the mere conveyance by his debtor of property, which, by law, is exempt from attachment. 1 Fairfield's Rep. 161.

A mere possibility of an injury is too remote a ground of action. 1 Swift's Dig. 284.

Private papers and account books are not goods and chattels, which are liable to be attached or sold on execution. 12 Mass. Rep. 506.

Choses in action are not liable to execution, either in law or equity. *Donovan v. Finn*, 1 Hop. 79.

The fact, that Peck knew the principal debtors intended to abscond, can make no difference in this case. The note could not be reached by any process at the time of the purchase. There is no pretence, but that the defendant paid a fair and full consideration for the note. The principal debtors, then, were in a better condition to pay their honest debts, *after* the sale, than they were before.

It will not do to say that the creditors of the Greenoughs might have brought a suit against them and have committed them to jail,—and, in this way, have wrested the avails of the notes from them. It will be seen, at once, that here is a mere possibility of an injury. On the same principle, the creditor might have obtained the purchase money given for the note.

If A. with a view to defraud his creditors, convey goods to B.—but B. *bona fide*, pays or assumes to pay, on account of the goods, debts of A. to the full value of the goods, B. cannot, afterwards, be charged as the trustee of A. 4 New Hampshire Rep. 469.

Where one, who was summoned as trustee, had received goods of the principal debtor, under a fraudulent contract, but, before

the service of the process upon him, had paid the debts of the principal debtor to the amount of the value of the goods received, he was entitled to be discharged. 12 Mass. Rep. 140.

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The Greenoughs could not have maintained an action against Peck to recover the note back ;—therefore, Peck cannot be adjudged a trustee. 2 N. H. Rep. 93. id. 374. id. 439.

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Negotiable promissory notes are not capable of being seized and sold on execution. One possessed of such, belonging to a debtor, is not, in virtue thereof, liable as a trustee of such debtor. 7 Mass. Rep. 438. 9 id. 537.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—It appears that Hawley executed a note to the Greenoughs, which is unpaid. That, before the commencement of this suit, Peck had purchased the note of the Greenoughs, paid them the value thereof, and notified Hawley of the purchase. The plaintiff endeavors, in this suit, to hold Hawley as trustee of the Greenoughs, on the ground that the purchase, by Peck, of the note, was fraudulent and done with an intent to enable the Greenoughs to defraud their creditors. If it is practicable to effect this object in this action, it will follow, that questions in relation to a fraudulent conveyance may be decided by the court, without the intervention of a jury. Nothing is disclosed shewing that Peck is in any way indebted to the Greenoughs. He has paid the value of the note, and the only object of making him a party is to obtain from him a disclosure, which may be evidence of a fraudulent transaction between him and the Greenoughs, and in order that the decision in this case may be conclusive upon his right hereafter to collect the note of Hawley. In Massachusetts it has been considered that this course may be taken. The impropriety, however, of thus passing upon the right of the assignee, without the intervention of a jury, led the court in that State to suggest that a legislative provision for a trial, by jury, of the question, whether trustee or not, would be highly expedient. The greater impropriety, however, of compelling a trustee to be examined on oath, in relation to fraud in a conveyance, or assignment, to which he was a party, when, by his answer to the interrogatories, he might subject himself to the penalty, provided in the statute against fraudulent conveyances, would lead us to hesitate, before we should say that any such proceedings ought to be sanctioned.

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The design of the statute was to subject property, in action, to be taken by the creditors of an absconding or concealed debtor, as property in possession is subject to be taken by the creditors of every debtor; and the statute evidently was not designed to try a question of fraud in the dealings between a debtor and his assignees. The creditor is placed in the situation of the absconding or concealed debtor, so far as to enable him to collect the money, goods, chattels, rights or credits of such debtor in the hands of his debtor. It was said by the very able and learned judge, who delivered the opinion of the court, in the case of *Sargeant v. Leland*, 2 Vt. Rep. 280, "that by money, "rights or credits, is meant cash in the hands of the trustee, or "debts due from him, belonging to the principal debtor;" and it is very obvious, that there must be some trust, or indebtedness, as between the debtor and the trustees, before such trustees can be made liable by the process contemplated in this act. Whether the trust must be such as could be enforced, or whether, in the case of a fraudulent trust, which should appear from proper testimony, and which could not be enforced between the parties, because they were both in *pari delicto*, the creditors could avail themselves of the provisions of this statute, is not a question arising in this case. In the case before us, there was neither trust nor indebtedness. Neither Peck nor Hawley had any property in trust for, nor were they indebted to the Greenoughs. The note of Hawley was transferred to Peck, and notice regularly given. Hawley ceased, after such notice, to be the debtor of the Greenoughs. Peck purchased the note, paid the full value, and held it for his own benefit, and not in trust for the absconding debtor. If the purchase was made *mala fide*, the remedy of the creditors must be sought in some other action, and not in this. At the time the note was received, by no process could the creditors of the Greenoughs have appropriated the avails of it in satisfaction of their debts. In the view which the plaintiff takes of the transaction, it was only a consequence of the purchase that the Greenoughs were enabled to abscond. We are very clear that the plaintiff cannot, from the disclosures made by the persons summoned as trustees, hold them accountable as such for the amount of the note in question. The judgment of the county court is therefore affirmed.

LANGDON & SCOFIELD v. ROSWELL R. KEITH.

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(In Chancery.)

1. When all the notes, secured by a mortgage, are assigned, the mortgage passes with them, but when a part only are assigned, whether the whole mortgage, or a proportionate part, or any interest therein, is assigned, depends on the real contract and actual agreement of the parties.
2. If an assignment of the whole mortgage be made by mistake, instead of a part, that may be corrected, in chancery, by a bill brought for that purpose, against the proper parties.
3. But if such assignee has conveyed, for a valuable consideration, to a *bona fide* purchaser, without notice of any mistake or claim by the original mortgagee, no decree will be made against him, to the prejudice of his interest, subsequently accruing.

This was a bill in Chancery stating, in substance, that the orators, as administrators of Eleazer Scofield, held a certain mortgage against one Mead, which was given to secure certain notes therein named; that afterwards, and in pursuance of a decree in Chancery, they assigned to Jos. Reed, in trust for certain infants and *femes covert*, all the notes mentioned in said mortgage except one of fifty-five dollars, and on that occasion assigned said mortgage to said Reed, the material part of which assignment was in these words: "We do hereby grant, bargain, sell, transfer and make over to the said Reed, his heirs, executors, &c., the above mortgage deed, and premises therein described, and the notes in the condition of said deed mentioned, except the fifty-five dollar note, to have and to hold," &c. they, the orators, supposing the effect would be that Reed would hold the mortgage as well for them, to secure said fifty-five dollar note, as to secure those assigned to him. Afterwards, Reed for a valuable consideration sold and assigned said notes and mortgage to the defendant. The defendant afterwards made advances to Mead, the mortgagor, and took another mortgage on the same premises to secure the same. The orators pray that Keith may be decreed to hold this first mortgage for the orators' security of the fifty-five dollar note, and to suffer proceedings thereon to be taken for their benefit, or to pay them the same, or for other relief, Mead being insolvent.

To this there was demurrer.

L. B. Peck, for the Orators.

W. Upham, for the defendant.

The opinion of the court was delivered by

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COLLAMER, Chancellor. When all the notes, secured by a mortgage are assigned, the mortgage passes. When a part are assigned and a part retained, it is entirely a matter of contract between the mortgagee and the assignee, how and for whose benefit the mortgage shall be holden. It is mere matter of intention and mutual understanding between the parties, which must be ascertained by courts, when appealed to, like all other questions of contract, intention or understanding, from the declarations and acts of the parties, and the facts, which the testimony developes. In the case of *Wright v. Parker*, 2 Aik. Rep. 212, the chancellor in giving the opinion says: "If the mortgagee choose to assign *all* his interest in the mortgaged premises, to secure but a part of the notes therein, assigned by him, he has a right so to do, and in such case, no interest in the premises could remain to him." The deed of assignment in this case, is in these words: "We do hereby give, grant, bargain, sell, transfer, and make over to said Reed, his heirs, &c., the above mortgage deed, and the premises therein described, &c., and the notes therein mentioned, except the fifty five dollar note." Now this clearly conveys the *whole mortgage* and all the notes, except one. Whether that was yet unpaid, or whether it had been collected does not appear from the deed. The orators allege that the assignment was so made by them under a mistake, they supposing they should still have an interest. If this deed is different, in its legal effect, from the contract, and is, by an actual mistake, drawn differently from the actual understanding of the parties, it may be corrected in chancery. This bill, however, is not framed with a view to such an effect. Reed is not a party, nor does it contain any sufficient allegations of mistake or accident.

It is however to be considered, that there comes in here a third person, Keith, the defendant. He purchases for a valuable consideration and on the strength of this deed of assignment, so expressed, and without any notice of claim by the orators, or of any such debt still existing, or, more especially, of their having still an interest in this mortgage, contrary to the express language of their own deed. Considering the notes he purchased as the only lien on the land, he has made advances and taken an additional mortgage. To say now that this first mortgage shall be enforced by Keith, for the orators, and they be thereby preferred to his second mortgage, would be to spring a trap upon him,

resulting from the act of the orators themselves, and might produce a result highly inequitable.

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It is, however, true that, as against Mead, this mortgage may be kept on foot, for the security of all for which it was given, until paid by him or legally discharged. The orators may, therefore, have the right to pay Keith both his mortgages, and redeem, as to him and them, and hold the mortgages for all the debts therein mentioned against Mead.

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The orators declining this relief, the demurrer was allowed, and the bill dismissed.

CALEDONIA COUNTY.

MARCH TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " JACOB COLLAMER. } *Assistant Justices.*
 " ISAAC F. REDFIELD. }

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JOHN CLARK v. GAMALIEL WASHBURN.

A person regularly authorized to serve a writ, by a justice of the peace, may serve the same, in any county, to the officers of which it may by law be directed, though it is not, in fact, directed to such officers,

If property be attached by a deputized person, to charge such property in execution, the execution must be delivered to the same person, within thirty days after the judgment, or, if delivered to another officer, it must be demanded or taken by him, within thirty days, or the attachment is dissolved.

This was an action of trover for one pair of horses. On the trial, the plaintiff proved that on the 10th day of Nov. 1835, a writ was sued out by McLean & Wallace against Sidney Patterson, signed by a justice of the peace, directed to the sheriff of Washington county, his deputy, &c. This writ the plaintiff was, by said justice, duly authorized to serve, by an indorsement thereon, agreeably to the statute. On said 10th day of Nov. 1835, the plaintiff served said writ, at Cabot, in the county of Caledonia, by attaching the horses now in question; and he put

said horses into the possession of another person, for safe keeping. This writ was duly returned to the justice, and judgment thereon was rendered against said Patterson, by said justice, on the 28th day of Nov. 1835, for fifty six dollars, and four cents, damages and cost. Execution of that date was taken out on said judgment, and delivered to a legal officer, who took no possession of said property, but, on the 15th day of December, 1835, advertised said horses to be sold on the 29th day of Dec. and, on that day, he went to the person, with whom the plaintiff had deposited them, and found they were gone. They were never demanded of the plaintiff.

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The defendant showed that a writ was sued out by Hall, Dickinson & Co., against the said Patterson, on the 10th day of November, 1835, signed by a justice of the peace, directed to the sheriff of Washington or Caledonia county, or either of their deputies, and which writ the defendant was, by said justice, duly authorized to serve. Subsequent to the plaintiff's attachment, but on the same day, the defendant, on this writ, attached these horses, but did not remove them from the custody of the depository. Judgment was duly rendered by the justice on this writ, against Patterson, on the 21st day of Nov. 1835, and execution issued of that date, which was then delivered to the defendant to levy and collect, which he was legally authorized to do. The defendant, on the 10th day of Dec. 1835, levied upon these horses, and advertised the same for sale, and on the 24th day of Dec. 1835, sold the same in due form of law, on said execution.

The court charged the jury upon the foregoing facts, that the plaintiff was entitled to recover the amount of the execution, issued on the judgment rendered on the attachment made by him, as it was admitted the horses exceeded that amount in value. To which decision the defendant excepted, and verdict and judgment being rendered for the plaintiff, the case passed to this court.

Eaton and Peck, for defendant.

I. The plaintiff had no authority to make the attachment. The writ was directed to the sheriff of Washington county, and it is perfectly clear that he could not have seized the property in Caledonia county, and we insist that the plaintiff's authority was not more extensive than the sheriff's. The statute provides that, if it shall be made to appear to a justice, that a writ of summons or attachment, &c. by him granted, may fail of service, for the

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want of a proper officer, seasonably to be had; he may deputize any suitable person to serve such process—"and the person so authorized shall have all the powers of the sheriff, *to whom such writ may be directed*, in the service and return of such writ." 1 Comp. Stat. 127. Sec. 11. The plaintiff's power was derived solely from this provision, and the only fair and obvious construction of the statute is, that his authority was limited by that of the sheriff. The word *may*, as used in this section, is the same as the word *shall*. *R. & R. v. Barlow*, 2 Salk., 609. So that the statute must be construed as if it read "that the person so authorized shall have all the powers of the sheriff, to whom such writ shall be directed." The 11 sec. provides, that if it shall be made to appear to the justice, issuing the writ, that it may fail of service for the want of an officer seasonably to be had, an indifferent person may be deputized. What officer is here intended? Most clearly the officer, to whom the writ is directed. It can be no other. In the case under discussion, the writ was directed to the sheriff, &c. of Washington county. The debtor resided there, and *there* the writ was to be served. Can it reasonably be supposed that the justice, issuing the writ, went into any inquiry, whether that writ would fail of service in this (Caledonia) county, for the want of an officer, when no one could suppose it would be served here? And does it follow, because the justice was satisfied there was no officer who could seasonably be obtained to serve the writ in Washington County, that he was also satisfied that none could be seasonably found to serve it here? If the position assumed by the plaintiff's counsel be correct, then the plaintiff might have served the writ in Bennington, or any other county in the State. This would be giving to the statute a latitude of construction, which the legislature could never have intended. Had they intended to confer this extensive authority on a person thus deputized, the statute would have been couched in different language.

II. The *lien* was lost by the officer, who held the execution for collection, neglecting to take possession of the property, or to demand it within thirty days. Merely advertising the property for sale, was not seizing it in execution. A levy can be made only by some act, which, in legal contemplation, is equivalent to the actual possession and custody of the property. *Fitch v.*

Rogers, 7 Vt. Rep. 403. *Lane et al. v. Jackson*, 5 Mass. Rep. 157. *Turner v. Austin*, 16 id. 181. *Denny v. Warner*, id. 420. *Gordon v. Jenny*, id. 465. *Bukham v. Lansing*, 3 Wendell, 446. *Hollister v. Goodale*, 8 Conn. Rep. 332. Whenever an officer has attached property, and holds it to respond the judgment, if the execution come into the hands of another officer, a demand must be made of the attaching officer, within the thirty days, or the property be actually taken in execution within that time; otherwise, the *lien* is gone. When the execution goes into the hands of the officer making the attachment, the rule is different. *Enos v. Brown*, 1 D. Chip. Rep. 280. *Scott v. Crane*, 1 Conn. Rep. 255. *Cole v. Wooster*, 2 id. 203. *Gates v. Bushnell*, 9 id. 530.

J. Mattocks, for plaintiff.

1. It is objected that Clark, who was duly deputized to serve the justice writ, had no authority, because the writ was directed to the sheriff of *Washington* county, and the writ was served by the deputized person in *Caledonia*. The 11th sec. of the justice act, p. 127, is relied on by the plaintiff, which authorizes a justice "to deputize any suitable person," and the defendant relies on the following clause in the same section, as limiting his authority.—"And the person so authorized shall have all the power of the sheriff to whom such writ may be directed, in the service and return of such writ," and it is insisted that, as this writ was directed to the sheriff of *Washington* county, the deputized person had only the power of that sheriff, in the service of this writ, and, consequently, had none in *Caledonia* county. The obvious answer to this objection is, that the word *may*, in this passage, has not the meaning of *shall*, nor has *may be*, the meaning of *is*, and is not to be so considered, as if it read, to whom such writ *shall* be directed, or to whom such writ *is* directed. This statute was, of course, speaking of the future, and *may*, here means precisely what *might*, the preterite of *may*, would mean, speaking of the past. This writ *might* or *could* have been directed to the sheriff of *Caledonia* county, and any other similar writ *may* or *can*, now or to-morrow, be directed to the said sheriff, and therefore the deputized person then had the same power as the sheriff of *Caledonia* county, and the sheriff had all required power. There is, therefore, no impropriety of language in our construction; and the good sense is certainly with us. The person deputized

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by the justice has no derivative authority from any sheriff; his authority is from the law, through the justice. The law intended, in particular cases, to give the deputized person the authority of any sheriff, or any proper officer. The 24th sec. of the judiciary act, says: "And every writ and process issued, as aforesaid, shall be directed to the sheriff, his deputy, or some constable in the town where the service is to be made;" and a *late* justice act directs all justice writs to be directed "to any constable in the county." Yet it has been decided under the first act, and under the second, in *Cooper v. Ingalls*, 5 Vt. Rep. 508, that if the writ was directed to the officer who served it, that was sufficient; and it would not only be useless, but nearly absurd, to require a writ to be delivered to an officer, who is not expected to, and does not serve it, in order to give authority to another officer, or *quasi* officer, who does. And if it be the law in this, as in some other States, that any proper officer may serve a writ within his precinct, without its being directed to him, (and it has been so intimated, if not decided,) then the defendant's construction would have the additional folly of requiring the writ to be directed to a sheriff that could have served it, without such directions, in order to empower the deputized person to serve it. Besides, if the construction be right, that no sheriff could then serve a writ, unless directed to him, still if now any sheriff can, *ex officio*, serve a writ, without its being directed to him, we may reject the words "to whom such writ may be directed," and the person authorized shall have all the power of the sheriff, which of course, will be considered the sheriff, where the service is made, and this will suffice, on the ground that the law of the land now requires no direction to the sheriff, or rather that the writ served is good without it.

II. It is objected that the lien was lost, because no demand was made of the person, who held the property. The demand, obviously, has nothing to do with this case. The suit is not against the person, with whom the property was left for safe keeping. The objection must be that "the plaintiff did not take the property on execution within 30 days." In the case of *Enos v. Brown*, 1 D. Chip. 280, Judge Chipman explained fully the meaning of the statute, and decided that putting the execution into the hands of the officer, who made the attachment, within 30 days, is sufficient, without any act being done by him within the 30 days; on the ground that the delivering the execution to the

officer charges the property, the same as it would charge a prisoner, who was in jail. In our case, the execution was not delivered to the officer, who attached the property, but the property was in the custody of the law, that is, in the custody of the plaintiff's officer, who served the writ, and in the actual possession of his servant; and within the 30 days, the plaintiff delivered his execution to a proper officer, who, within the 30 days, advertised it for sale on the 29th Dec. before which day, on the 24th, the defendant sold and converted it. The advertising was of course in the common form; "taken on execution." The property was therefore, in law, taken on execution, or levied upon. The objection is only, that the officer took no actual possession of the property. Why was this formality necessary? Not to give notice of the levy. The advertising of the property did this. And for what end should he have taken actual possession, and delivered it back to the keeper? The analogy, which the judge, in the case cited, said existed between charging property and charging the body, may be carried further in this case. When the sheriff receives an execution against a man, already in prison, must he do any act more than leave the copy? Need he take the prisoner out and recommit him, or do any act except on paper? Or to make it just this case, when a new jailor finds a prisoner already in custody of the law, need he do more with another execution, than the old jailor need have done with the same execution. In *Fletcher v. Pratt et al.* 4 Vt. Rep. 182. the court say: "We deem it settled that if the creditor preserves his lien upon the property, as against the attaching officer, by giving out his execution within 30 days, that establishes the lien upon the same property in favor of the officer. In *Eastman v. Curtis*, 4 Vt. Rep. 616, the court say: "And the return of the officer, in relation to choosing appraisers, is conclusive upon the parties, and those claiming under them." Why does not this return of the levy stand on the same ground?

The opinion of the Court was delivered by

COLLAMER, J.—The first question arising in this case relates to the authority of the plaintiff, to attach the property. In relation to this the court are not unanimous in opinion, but a majority of the Judges, present, are of opinion that the plaintiff had legal and sufficient authority to serve the writ of attachment, as the same was served by him. The next question relates to the lien being kept and retained upon the property on the debt of

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McLean and Wallace. The statute provides, (Vol. 1. p. 68. Sec. 33.) "Where the goods or chattels of any person shall be taken on *mesne process*, the same shall be holden thirty days from the time final judgment shall be rendered in said suit. And unless the plaintiff in said suit shall, within the term of thirty days from the time of rendering such judgment as aforesaid, take said property in execution, the same shall be discharged from said process, and be no further liable to answer said judgment, than though the same had not been attached." The true meaning and effect of this statute has been a frequent subject of judicial investigation, and has been very clearly, and we think, very correctly, decided. The officer, serving the attachment, is the keeper of the property, in custody of law, and, for this, the law furnishes him authority for the full term of thirty days after final judgment, and no longer. If the property is not then *taken in execution*, the officer must deliver the same to the owner, or it will be subject to his control and to the attachment and executions of all his creditors. If the execution be, within the thirty days, delivered to the same officer, who has the property, this furnishes him authority to retain it, and it is *taken in execution*. If the execution be delivered to some other officer, though done within thirty days, this, most obviously, would not put the property into his custody, and if nothing more was done, most clearly no action could be sustained against him for not *safely keeping* the property, which he never had. Therefore, it cannot be said, that by the mere giving out the execution to an officer, who never had the property, the property is *taken in execution*. The officer, who has the property, unless the demand is made of him, has no means of knowing that any execution has issued. When the thirty days has expired, the officer, holding the property, should have some clear and certain knowledge whether he may then deliver the property to the owner, or suffer his other creditors to take it, or should be able to deny them this with safety. This security cannot be furnished him but by having the execution delivered to him or unless the officer holding it shall actually take the property or demand it of the attaching officer, within the thirty days. In analogy also to the arrest of the body, this equally holds true. In that case, if the execution be seasonably delivered to the sheriff, who has the prisoner in custody, it charges the body, but if seasonably delivered to a

different officer that does not charge the body in execution, until a copy with the officer's return is also left, within the time.

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In this case, the attaching officer had not used up the property nor sold it, nor delivered it to the owner, within the thirty days, and the same being, without his fault, taken on the tenth day of December, 1835, could not excuse the first attaching creditor from charging it seasonably in execution. In the case, *Enos v. Brown*, D. Chip. R. 280, *Chipman*, C. J., says: "So if the attachment of personal property, on *mesne* process, was made by the sheriff, and the plaintiff deliver his execution to the constable, he does not thereby charge the property in execution. He must see that the execution be delivered thereon within thirty days, or a demand be made of the sheriff to charge him, *in case the property has been eloigned.*"

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In this case, the property was taken by defendant, before the thirty days expired, but it was legally applied on the proper debt of the owner of the horses. The plaintiff is not liable to Mc Lean & Wallace, as their lien was discharged. He is not liable to Patterson, as the property has been legally applied on his debt by the defendant. Therefore, if the taking by the defendant, were, when done, a tort on the plaintiff's possession it could only enable the plaintiff to recover nominal damages. This verdict and judgment for the full value of the property must be reversed.

Judgment reversed.

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JOHN P. DIXON v. EMERY OLMSTEAD.

If one escape from another State and be arrested here, in obedience to our statute, as a fugitive from justice, and contract with the party aggrieved for his release, such contract, while executory, is void, as against good policy.

Both parties are to be considered *in pari delicto*, and if the party accused pay money or other thing, to obtain his release, the law will not aid him in recovering it back again.

This was an action of trover for a horse. The facts in the case were, in short, that the defendant procured one Blodget to come from New-Hampshire, into the town of Barnet, in this State, after having procured a warrant to arrest the plaintiff in that State, on a charge of forgery, and here procured the warrant of two justices of the peace, for the arrest and surrender of plaintiff, to answer to the charge of forgery in the State of New-Hampshire. The plaintiff declared himself innocent of the alleged forgery, but, on conferring with defendant's agent, the matter was agreed to be settled, by plaintiff's paying defendant one hundred and fifty dollars, in part payment of which, the horse in controversy was delivered to defendant by plaintiff. Previous to this arrangement, the defendant's agent had threatened immediately to arrest plaintiff in the manner above set forth, and, as part of the settlement, the defendant promised not to prosecute the indictment for forgery. There was no evidence given of the forgery having been in fact committed by plaintiff, except as above stated, and the only evidence given to the jury of the existence of the warrant in New-Hampshire, or in this State, was the evidence given by plaintiff of the declarations of defendant's agent, that he had procured such warrants to be issued, and had the latter then in his hands, and some one in readiness to serve it, if plaintiff should refuse to make the compromise. The court decided, that if the jury believed the evidence, the defendant was entitled to recover. To this decision of the court the plaintiff excepted, and exceptions were allowed and the case comes here for revision of that decision.

Charles Davis, for plaintiff.

The direction given to the jury in this case, by the county court, cannot be sustained by principle or authority. The position, that money or other thing, paid or delivered, in pursuance of an illegal contract, or in furtherance of some illegal or immoral purpose, in which both parties have a common participation,

must be left where they have placed it, and cannot be recovered by law, by one from the other, is too strongly fortified by adjudged cases to admit of doubt. We have no disposition to call it in question. But it has no application here. If there was any thing against law in the transaction, which terminated in the delivery of the horse, for which this suit is brought, it was the wrong only of the defendant. The parties were not in *pari delicto*.

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If Olmstead committed the offence of compounding a criminal prosecution, commenced for wicked gain's sake—obtained Dixon's horse by fraud or duress, or without valuable consideration—in either of these cases, the latter is entitled to recover. In the two last cases, it will not be pretended that there could be *par delictum*. It is only in the former that the defendant supposes the plaintiff concurred with him in the guilt of the transaction. The defendant then is placed in the singular position, of desiring to aggravate his own enormity, in respect to the crime against the public, with the view of screening himself from responsibility in the civil suit by the party injured. We must not suffer him to affix any other character to it than such as it deserves. Did Olmstead, or which would be the same thing, did Blodget, his agent, whose doings he authorized and sanctioned, commit an indictable offence against our laws, and if so, what offence, and how is it punishable?

The only offence of this sort, known to the common law, is that of compounding a felony, which consisted in causing a criminal prosecution for felony to be instituted, and then discontinuing it, upon the receipt or promise of a reward by the party prosecuted. It was a misdemeanor merely, and punishable by fine and imprisonment. It seems originally to have been confined to the case of receiving back one's goods or money, taken by theft or robbery, upon agreement not to prosecute, and with or without a reward for so doing. Hence it receives the name of *theft-bote* in the old books. 1 Hale, P. C. 546, 619. 2 id. 400. 4 Bl. C. 133, 136.

Compounding a prosecution for a misdemeanor seems not to have been indictable, although it is so far regarded illegal, as to preclude a recovery on any contract, into which it entered as a consideration. *Collins v. Blantern*, 2 Wilson, 341. *Edgecomb v. Rodd et al.* 5 East. 294. *Badger v. Williams*, 1 D. Chip. Rep. 137. 2 Chit. Crim. Law, 220, 232. *Howson v. Han-*

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cock, 8 T. R. 575. *Beeley v. Wingfield*, 11 East. 46. *Baker v. Townsend*, 7 Taunt. 422.

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If, however, as is most probable, the agreement is to be construed merely as an undertaking to forbear further proceedings in the process, the purpose of which was only to effect the transportation of Dixon from the state, where his domicile was, into another jurisdiction, there to be tried, we submit that it is very far from being such a promise not to prosecute, as all the authorities represent to be essential to the offence. The proceedings, so far as this state is concerned, are merely initiatory, designed to expatriate a citizen and to subject him to other laws. To institute them with a view of extorting money or other thing, upon forbearance, may be duress, extortion, obtaining money by false pretences, swindling, or whatever other name, but it cannot be the common law crime of compounding prosecutions.

This point does not rest upon argument merely; it has been settled by solemn judicial decision, in this very case—the county court, in an indictment against Blodget, having determined, on demurrer to the indictment, that the offence was not committed and could not be, in reference to proceedings instituted to remove one from this state into another, for trial there. For such a doctrine no warrant could be found in any books, English or American. It is enough to rest upon this determination, grounded, as it is, upon the soundest principles. But whenever the subject shall be again brought under the consideration of our courts, it may be admissible to push the inquiry a step further.

Persons aggrieved may and do move primarily in these prosecutions, giving information and aiding and assisting the prosecuting officers in bringing the guilty to punishment, but they are not permitted to wield this machinery to effect their own purposes. They can have no right, any more than other individuals, of controlling prosecutions. They could not, if they would, compound offences, without the concurrence of the public prosecutor. They may, it is true, by operating upon the fears of the weak and irresolute, extort money or other thing from them, under threats of prosecution, and this, we admit, would deserve severe reprehension. But the essence of the offence consists, not in permitting criminals to go unwhipt of justice, but in extorting, by such means, either from the guilty or innocent, their money. This is a common law offence or not, according to the

means made use of, in every respect as applicable to our situation and circumstances, as to those of England. 7 Dow. & Ry. 345. In that case, the respondents were convicted of conspiracy to extort money from the prosecutor, by offering to compound two indictments for keeping a gaming house, for a certain sum in money.

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In the case of the *Queen v. Woodward et al.* 11 Mod. 137, it was determined, that extorting money and a note, under color and pretext of a warrant, alleged to have been issued by a justice of the peace, for perjury, was an indictable offence. There the party injured was in custody, at the time of the threats.

In *Rex v. Southerton*, 6 East, 126, the court decided, that to threaten one, not in custody, with a prosecution under a penal statute, with a view to extort money, is not indictable at common law, although it would be so under the statute of 18 Eliz. c. 5. See form of the indictment against *Woodward*, 3 Chit. Cr. Law, 842. *Rex v. Crisp*, 1 B. & A. 283. 6 Petersdorf, 25, 31. 1 Russell on Crimes, 136, 137. 10 Bing. 107.

The statute of 18 Eliz. c. 5, greatly extended the remedy by indictment, making it punishable by two hours exposure in the pillory, forfeiture of £10, and disability to sue on any penal statute, to compound any prosecution upon any penal statute. Dane says this statute has been substantially adopted in New York, and is common law in Massachusetts. In this State, it has not been adopted by statute, and it is presumed that no one will suppose that it makes a part of our common law.

As the crime which it was pretended Dixon had committed in New Hampshire, was not a forgery at common law, but merely a misdemeanor, punishable by fine and imprisonment, it follows that neither Olmstead nor Blodget could be subjected to punishment for instituting a prosecution for that offence in our courts, and then taking money or other thing for abandoning it; and, of course, the plaintiff could not be a *particeps criminis*, where no crime was committed.

But, whether this opinion be well founded or not, there is another view of the present case, which will lead to the same conclusion. There was no prosecution commenced, or even threatened in this State, which could be compounded.

The case, in fact, does not shew that any warrant had been prayed out in either State, and, consequently, none is shown to have been served; it shows merely, that Blodget asserted that

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he had one to convey plaintiff to the line, and that, unless the matter was settled to his satisfaction, it should be immediately handed to Kelley to be served. To prevent this, the plaintiff was induced to deliver his horse, some money and the notes, upon receipt of which Olmstead agreed to pursue the prosecution no farther.

Is this compounding a prosecution? If the agreement be understood to extend to a prosecution in New Hampshire, it will scarcely be pretended that this would constitute an offence indictable in Vermont.

The person, against whom a criminal prosecution is commenced or threatened, and who is induced to part with his money or other property to relieve himself from it, without reference to the question of guilt or innocence, is no where regarded as a *particeps criminis*, but is treated as peculiarly exposed to the designs of the compounder. There are no forms to be found for indictments against him at common law, nor do the elementary writers intimate that he can be indicted.

The statute of 18 Eliz. is levelled wholly against informers and plaintiffs, who shall compound or agree with those, "who shall offend or shall be surmised to offend," and attaches no penalty and imputes no guilt to the latter. See the statute 1 Bacon, 43, 2 Chit. Cr. Law, 220, 232. *Edgecomb v. Rodd & others*, 5 East, 294. *Clarke v. Shee & Johnson*, Cowp. 197.

In Cowp. 790, *Browning v. Morris*, it was determined that the insured, in a lottery transaction, may recover back the premium paid to the insurer of tickets, because the statute, 17 Geo. 3, c. 46, imposes the penalty wholly on the insurer and not on the insured. *Jaques v. Wither & Reid*, 1 H. Bl. 65.

The case of *Smith v. Bromley*, 2 Doug. 696. n. decides, that money, paid by the friend of a bankrupt to a creditor, to sign his certificate, may be recovered back, under the statute of 5 Geo. 2 c. 2, 4, prohibiting the taking of money under such circumstances. The objection that plaintiff was *particeps criminis* was insisted upon. *Jaques v. Golightly*, 2 Bl. R. 1073, is similar to that of *Browning v. Morris*. In *Holman v. Johnson*, Cowp. 341, Ld. Mansfield observes, that "the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which

the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may so say.”

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We lay no stress on the case of *Lacoussade v. White*, 7 T. R. 531, where the plaintiff recovered £100, paid to defendant on an illegal bet, although there was no ground to distinguish between the parties, because it seems to be overruled by that of *Houison v. Hancock*, 8 T. R. 575, as also by *Lubbock et al. v. Potts*, 7 East. 449, which forbids the premium paid on an illegal insurance to be recovered back. In these and many other similar cases, the parties evidently stand upon the same footing, both volunteering to do some act prohibited by law, and hence the maxim applies, *potior est conditio defendentis*.

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This rule of law is too well established to admit of doubt, but is not regarded by the courts with much force, for the reasons mentioned by Ld. Mansfield. It is, in fact, like another rule, equally well established, which, in case of a payment of a less sum than the debt due, directly made in money, will not give it the effect of full payment, though so intended and declared by both parties. This rule is broken in upon on every occasion where a distinction can be made, which will let in the natural justice of the case. Hence, money deposited with a stake-holder, on an illegal wager, may be recovered back if not paid over, even after the event is determined against the plaintiff. *Aubert v. Walsh*, 3 Taunt. 277. *Cotton v. Thurland*, 5 T. R. 405. *Simmons v. Borlond*, 10 John. 469. *Allen v. Ehle*, 7 Cowen, 486. *Busk v. Walsh et al.* 4 Taunt. 290. *Mount & Wordell v. G. & R. Waite*, 7 John. 434, Kent's opinion.

And if paid into the hands of the opposite party, without the intervention of a stake-holder, the illegal contract may be rescinded at any time, while it remains executory and the deposit recovered back. *Tappenden v. Randall*, 2 B. & P. 467. *Lowry v. Bourdieu*, Doug. 468. *Williams v. Hedley*, 8 East. 378, where the true distinction is briefly but clearly enforced. See, also, *Taylor v. Lendy*, 9 East's. Rep. 49.

These cases are entirely decisive of the one at bar. In principle, it seems impossible to imagine any valid distinction.

John Mattocks, for defendant.

The simple question is whether the plaintiff, having paid property to the defendant to compound a felony, can recover it back. "When money has been paid by one of two parties to an

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illegal contract, in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed, to recover the money back again, for *in pari delicto potior est conditio defendentis*." Wheaton's Selwyn, 75—6, and the notes on the same pages, where many cases are cited and compared. When both parties are equally in fault, the defendant has the best of it, and that is precisely this case.

The opinion of the court was delivered by

REDFIELD, J.—The principles, applicable to cases of this character, are very well settled. The only difficulty here is in determining to which class of cases this belongs. If this is to be treated strictly as a compounding of felony, and, as such, an indictable offence, it is past all controversy that the plaintiff cannot recover. For both parties are to be considered *in pari delicto*, and the case will then be determined by the well known maxim, *potior est conditio defendentis*. It needs no laboured argument to show the doctrines upon this subject or the reasons, upon which they are founded. They are too familiar with the profession to require much comment.

Whenever a contract has for its object the contravention of the express provisions or prohibitions of some statute, or any other act or omission, which is against good morals and not allowable in the forum of conscience, or subversive of sound, wholesome policy in government, such contract, while it remains executory upon both parties, is of no binding force whatever, and both parties are, in contemplation of law, the same as if the contract had never been made. But if the contract had been executed on the one part, by the payment of the consideration of the corrupt agreement, and the other party refuses to perform his stipulations, no action can be maintained against him, either upon the contract or to recover back the consideration. These principles have been long established, and upon reasons of the soundest policy.

There are some few cases of exception to these general rules, by express statutory provisions, such as money lost at play, which may be recovered back again by the losing party, although he is admitted to be equally in fault with the other party.

- This exception is one founded on a higher policy than the rule itself. There are other cases, in which the party paying his money is treated as the *oppressed* party, and is permitted to recover back money paid, on the ground of some supposed infr-

mity or some peculiar liability to outrage or extortion, from the circumstances in which he is placed at the time.

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Thus, in the case of a usurious loan, the party, paying interest beyond the legal rate, is allowed to recover back the amount, as so much money extorted from him by a supposed duress of circumstances, although it must be admitted the money was paid voluntarily and in direct contravention of the express provisions of the statute. And in the same light are viewed illegal wagers, before the money is paid over to the winning party, also money paid for the illegal assurance of lottery tickets, and money paid to induce creditors to sign the commission, or to aid the bankrupt in obtaining his certificates. But these are all considered as excepted cases, on the ground of some superior policy in the rule excepting these cases from the general rule.

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Olmstead.*

In many of the cases there is an express statutory exception, and others are so similar, as not to be distinguished from them.

But the present case is one which could not strictly have occurred at common law. It is not precisely a compounding of felony, and the indictment in the county court, charging the offence as such, was held insufficient, on the ground that no felony had been committed within our jurisdiction.—And still it cannot be admitted, that the transaction was an innocent one, on either side. Our legislature, previous to the provisions made by Congress on the subject, did provide for the surrender of fugitives from other States. This was to be made by the warrant of any two justices of the peace, of the county where the arrest should be made. It was under this statute the defendant was proceeding to bring the plaintiff to trial for an alleged felony, committed in the State of New Hampshire. For the purposes of this trial, it must be considered first, that the plaintiff was guilty of the offence. For if when he was threatened only with *legal* process, and the *ordinary* proceedings in such cases, he saw fit to come forward and compromise the matter, it is not in *his* mouth to deny his *guilt*. (And it was so held in *Swasey v. Mead & Chase*, Orleans Co. Sup. Ct. March T. 1832.) And again, if the plaintiff saw fit, as in this case, to give in evidence the declarations of defendant and his agent, that he had procured warrants in New Hampshire and in this State, to arrest the plaintiff on this charge, these declarations thereby became evidence, and as the verdict was directed, on the ground that the jury should believe all the evidence, it must be considered that such warrants had been taken out in the manner alleged.

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Hence the plaintiff in this case is to be treated as a fugitive from justice, just about to be arrested, and surrendered in obedience to the laws of this State, for his trial in another jurisdiction. In this state of the case, the plaintiff pays money and other property to defendant, for the purpose, and with the agreement to compound and stifle this prosecution. It is not pretended that defendant threatened the plaintiff with any other than a legal and usual prosecution for the offence. And no man can be considered as under duress, when he is threatened, or indeed visited, by the ordinary modes of legal process, either in civil or criminal proceedings. Our legislature have seen fit to institute this mode of securing the surrender of fugitives from justice. The policy of such a law is very apparent. It is desirable, above all things, that the State should never prove a sanctuary for crime, a refuge for the guilty violators of just laws, [either here or elsewhere. Such, undoubtedly, would be the case, if no provision for surrendering fugitives from justice existed. And where such laws do exist, it cannot be doubted that compounding a prosecution under them is indictable, as a high misdemeanor. And it is certainly difficult to see why the parties are not *in pari delicto*. An innocent man seldom wishes to prevent the ordinary course of justice. And whether the accused be innocent or guilty, it cannot be admitted, that any right whatever exists to counteract or resist the operation of the law.

Such contract could hardly be less *immoral*, nor could it be less against sound policy, than if there had been the compounding of a felony committed here. The fact that the forgery is considered as committed within the territorial limits of another jurisdiction, and, of course, technically not against our law, does not, in any sense, justify the offender in *buying* off from a regular prosecution for the offence, nor justify the courts in giving countenance to the transaction, by aiding the party in recovering property, surrendered in furtherance of such an illegal contract.

Nor do we feel warranted in treating the plaintiff as the innocent victim of the defendant. Every man here knows his rights, and knows, and feels too, that those rights are held sacred, not only by our own tribunals, but equally in our sister States. If innocent, he has a right to expect an acquittal; if guilty, he may or may not be convicted, but in neither case can he feel warranted in *bribing* the first minister of justice, (as the party aggrieved

always will be,) not to institute, or to discontinue a prosecution already instituted.

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We know, indeed, that an innocent man may, from want of firmness, or want of trust in the fairness of our tribunals, or the integrity of witnesses, or from horror at being suspected of crime, be induced to pay money, even perhaps to compound and stifle a prosecution. But, however innocent one may be of the offence charged, such an escape could not fail to involve the party in almost equal guilt with the actual offender. And we do not perceive any such constraint in the present case, as would be likely to enable persons to extort money at will from the innocent, although not unsuspected. What has been said has not been done with any intention to cast suspicion upon the character or conduct of any one, but from necessity to show the degree of guilt attaching to the plaintiff's conduct. And, at the same time, it is apparent the defendant does not escape through his own innocence, but because the plaintiff's hands are too corrupt to handle the price of guilt, which he must therefore lose, and which the defendant retains from necessity, and against the laws both of honor and good conscience.

*Dixon
v.
Olney.*

The judgment of the county court is therefore affirmed.

E. C. PARKS, & Co. v. LYDIA CUSHMAN, Trustee of STEPHEN HADLEY.

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1837.

Personal property, exempt from the levy of execution, is not to be held liable in the hands of a trustee.

The maker of a promissory note, made payable to the wife during coverture, and for her separate property, is not, on that account liable, to be sued, as the trustee of the husband.

Personal property, inherited by the wife during coverture, after a decree of distribution made by the probate court, is liable to attachment by the trustee process, in the hands of the administrator, at the suit of the husband's creditors.

This was an action upon the statute, relating to absconding or concealed debtors, &c. The goods came to the hands of the alleged trustee, as administratrix of one Sole Cushman, who was the brother of the wife of Stephen Hadley, the principal debtor. Among the goods were certain articles of household furniture and other property, exempted from attachment and levy by statute. There was, also, a promissory note, which the trustee had executed to the wife of the principal debtor, for her share in the real estate of the deceased.

The only interest which Stephen Hadley, the principal debtor, had in any of the property, was in the right of his wife, she being an heir to the estate, of which the trustee was administratrix.

Subsequent to the service and entry of this writ in court, but before the trial, the property had been duly distributed to the several heirs, by order of the probate court, and the share of the principal debtor's wife retained by the administratrix to await the determination of this case.

The county court adjudged the trustee liable for all the personal property, not exempt from attachment and levy, and not liable for such exempted property, or for the note.

Both parties excepted to the decision, and the case comes here for revision and final determination.

D. Hibbard, for the plaintiffs.

1. No property in the hands of the trustee is exempted from being sold on the execution. See trustee act, Section 5. "*And execution shall issue on the judgment so recovered against the goods and chattels of said principal debtor in the possession of said trustee.*"

If the principal debtor held a note against the trustee for one

cow, 10 sheep, 5 bushels of wheat, &c. the trustee would be held liable for the same to the creditor.

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The trustee cannot be supposed to know any thing about any other property of the principal debtor, whether he has one or more cows, and, in this action, such an inquiry cannot be had. It will be in time for him to look after his last cow, when she is sold on the execution.

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Lydia Cushman

Executors and administrators may be summoned as trustees. 2 Comp. Laws, 33.

II. By marriage, the husband becomes entitled to all his wife's personal property. 2 Bl. Com. 433, 445. Co. Litt. 351.

And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. 2 Bl. Com. 433. *Nelthrop & Wife v. Anderson*, Salk. 114.

Blackstone concludes this subject as follows, viz :

"Thus and upon these reasons stands the law between husband and wife, with regard to chattels real and *choses in action*. But as to chattels personal or *choses in possession*, which the wife hath in her own right, or ready money, jewels, household goods and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revert in the wife or her representative." 2 Bl. Com. 435. Co. Litt. 351.

John Matlocks, for the defendant.

We deem it a question of judicial policy, on the construction of the trustee act of 1833, whether the property of the wife, who is an heir, can be seized in this form, after the death of the intestate, and before it comes to the possession of the wife, to pay the debts of the husband. If the statute will admit it, it does not require such a construction as to deprive her of the benefit of legacies or heirship, or compel a child or other relations to be cut off, by leaving the property to others. She cannot enjoy it, if it can be so taken. And persons of property, who are disposed to aid their poor female married relations, will be driven to indirect methods, to accomplish what it is humane and reasonable to allow them to do directly. The right of the wife, as to her property, is regulated in law, and in chancery, by a course of decisions well known to our courts and legislators, and these are somewhat different in equity from what they are at law, and it is no fraud in the wife or her relations, to arrange before-

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hand, to bring the property within the protection of equity, and prevent creditors of the husband from seizing it at law. Therefore, to enlarge the rights of the husband's creditors, is, in effect, to abridge the wife's, and although it is competent for the legislature to do this, yet, it should not be construed to have been their intention to do it, unless the language of the act is explicit, or unless there was no other important and sensible object in the act. The great object of the act is apparent. It was to reach the property of the absconding debtor before it came to his possession and care, lest it could not be reached afterwards. What shall be regarded as his property is untouched by the act, and, in deciding this, the court will hold that only to be the debtor's property, which is his by law, equity and justice. For this action is much in the nature of a bill in chancery. It is, indeed, but the custom of London introduced here by statute, in lieu of the chancery process, for a creditor to bring his bill against his debtor's debtor, to pay the debt to him. And was it ever heard of, or would a court of chancery listen a moment to an application in chancery to have a debtor to the debtor's wife pay the debt to the creditor of the wife's husband? (It is true, the creditor can attach and hold the personal property of the wife, on a debt against the husband, because it is his in law.) It is equally true, that in chancery, in many cases, the wife can have her property protected against her husband's creditors, and against her husband also, because it is in justice hers. When the vendee pays his money for personal property and leaves it in the possession of the vendor, a creditor may attach it, as the property of the vendor. But could the question in any form be presented, who would contend that the vendee would be regarded as the trustee of the vendor? A creditor may have a strict legal right in one form of action, that he has not in another form. So, in this case, when the wife's right in the estate was reduced to personal property, it became subject to the claim of the husband's creditors, because it was, in strictness, the husband's property. But she having the right to take securities for her principal, and to live on the interest, and transmit the principal to her heirs, any process, that shall deprive her of this right, is a violation of her personal rights. The most, therefore, the plaintiffs could be entitled to, in this form of action, would be to hold her personal property, which her husband, when the action was brought, owned. But, at that time, the estate, to which the wife was heir,

was unsettled, and, she only entitled to a distributive share, and the suit prevented her selling or compounding with the main heirs, and recovering the money to put at interest, and forced her to have the personal property set off to her in kind, which, according to the plaintiffs' construction, compels the wife of the poor man to have her little windfall from her brother go to the previous creditors of her husband, who never could have gained a credit upon this fund. We regard this as a sharp attempt by the plaintiff to obtain the wife's property, which was never intended, and probably not thought of by the legislature, in passing this act.

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A distributive share in an estate is a *chose in action*, and the wife has it by survivorship. 1 Dane, 342. *Blount v. Bestland*, 5 Vesey, Jr. 516.

No suit can be brought at law, or in the ecclesiastical courts, by husband alone, for the wife's legacy, without first making provision for the wife. Where the wife gives her legacy to her husband, without consideration, it will be set aside in equity, *Wright v. Rutter*, 2 Vesey, Jr. 673. Unless the husband reduces it to possession, by exercising some act of ownership over it, no property vests in him. 1 Dane, 341. Douglas, 452. Husband is trustee for wife, for lands deeded to her, and the lands not liable to his debts, when he becomes bankrupt. 1 Dane, 578. *Bennet v. Davis*, 2 P. Wms. 316.

The opinion of the court was delivered by

REDFIELD, J.—The only question admitting of serious doubt in this case, is, whether the interest of the husband is such in the personal property of the wife, which she inherits during coverture, after distribution is made, but no possession, *in fact*, taken by the husband, that it can be held by this attachment, in the hands of the administratrix, and thus applied upon his debts. For, in relation to the other questions, attempted to be raised, there seems little ground for doubt or controversy. This process of attachment, when made to operate upon personal property, is coextensive with that of attachment on *mesne* process, which is limited, of course, by the right to levy execution. Whatever property, then, is exempted from levy of execution, must, of consequence, be exempt from attachment, whether by this or the ordinary mode of process. The only object of attachment of property, in any case, is to hold it subject to the levy of execution. And in this case, if it were so requested,

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the court would order execution to issue against the goods and chattels of the principal debtor, (if any,) in the hands of the trustee. It would seem, then, to involve a very manifest absurdity, that the property, which is confessedly not subject to the levy of an execution, in the hands of the debtor himself, should be adjudged goods and chattels, within the meaning of this statute, in the hands of the trustee, and the latter adjudged liable to hold them in readiness for levy of execution, which is expressly prohibited by statute.

In regard to the promissory note given to the wife, and for her separate property, it is well settled, that, both at law and in chancery, it will be treated as her separate property, and, unless collected during the coverture, belongs either to the wife or her personal representative, as the case may be, after the coverture is at an end. There could be, then, no plausibility in holding the trustee liable on that account.

In regard to the question of the personal chattels, in possession of the trustee, we see no good reason why the administratrix, in this case, should not be held liable, as trustee. Those, acting in an official capacity, like executors or administrators, but for the recent statute, would not be liable. That statute has removed all objection on that ground. And the character of the property being personal chattels, not in action, but in possession, there is no possibility of securing the separate property of the wife. If the administrator should not be held liable, the plaintiff or any other creditor, might immediately levy an execution upon the property, and, for any thing we can see, must hold it. (This property, after it is set to the share of the wife, is the same as any other personal property of the wife, in possession. It becomes the absolute property of the husband.) And whether the property belonged to the wife, at the time of marriage, or was acquired during coverture, either by purchase or inheritance, does not vary the case, in the least. The moment the property passes from the former owner, in the latter case, and the moment of marriage in the former, *eo instanti*, it vests in the husband. In the one case, the woman becomes divested of her former interest, or rather it merged in the right of the husband, and, in the other case, no interest ever vests in the wife.)

The right of an heir to a distributive share in an estate, as has been argued, is not ordinarily attachable. If it be the right of the wife, it is treated like other *choses in action*, and

she takes it by survivorship. And, in this case, if the rights of the parties were to be decided as they stood at the time of the service of the process, as in ordinary cases, the administratrix could not be held liable. But our statute attaches all property in the hands of the trustee, at the time of the service of the process, or which comes into possession before the disclosure.

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While this property formed a portion of the general estate of the ancestor, it was a mere *chose in action*. Had it been destroyed by a stranger, no action could have been sustained by the husband on that account. But after distribution made it ceased to belong to the estate. Had it then been destroyed, it would have been the loss of the wife and not of the estate. The husband could have sustained trover against any one, who should have converted the property, and without joining the wife. Upon the decease of the wife, the property would go to the husband and not to her executor or administrator, and, upon the decease of the husband, would go to his personal representative, and not to the wife.

In every view, which we can take of the case, we can treat the property in no other light than as having passed from the estate and vested in the husband, not in right of his wife, as an inchoate interest, to be perfected by manual custody, but absolutely, and the possession of the administratrix thenceforth becomes that of the husband.

In this view of the case, it would seem to be very useless to hold the property not liable to this attachment. In analogy to all precedents upon the subject, the property, which the court below adjudged liable to this process, must be treated as the absolute property of the husband. The judgment of the county court is, therefore, affirmed.

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WILLIAM MATTOCKS v. JOHN STEARNS. & LYDIA STEARNS,
his wife.

If the county court admit evidence of notice to the opposite party to produce a deed, before any evidence is given of the existence of the deed, and, the deed not being produced, permit the party to proceed and prove its contents, it is an informal mode of proceeding, but no ground of error. The court below has a discretion in regard to the order of introducing testimony.

In the case of a deed of lands, the court will not presume it to have been recorded, or require the opposite party to search the records of the proper office, before resorting to oral evidence of its contents.

If the opposite party, in whose possession a deed is presumed to be, is out of the State, notice to his counsel, to produce the original, is sufficient to warrant the introduction of secondary evidence of its contents.

The husband has such an interest in the freehold estate of the wife, after issue born alive, as may be taken by levy of execution, by his creditors.

This interest is liable to be defeated by a divorce, *a vinculo*.

The mode of levy is by metes and bounds, and to exhaust the interest of the husband, as far as the levy extends.

If the husband remain in possession of the land, after the expiration of six months from the levy, he is a wrong-doer and may be sued in ejectment.

The wife is not liable to be joined in such suit.

But if she be joined, the plaintiff may amend, on terms, by striking out her name, and take judgment against the husband.

This was an action of ejectment for about seven eighths of an acre of land in the village of Danville.

Plea, severally, not guilty, and issue to the jury. On trial the plaintiffs introduced a deed from Josiah Bellows to Caleb Wheaton, dated, 10th May, 1828, containing the land in question. He also introduced, a levy of execution upon the same land in his favor, against John Stearns, one of the defendants, dated, August 5th, 1834. He then introduced evidence, tending to prove, that Caleb Wheaton was the father of John Stearns' wife, the other defendant, and that he died seized and possessed of the premises sued for, and that his estate was nearly settled and the debts all paid, and that he left a wife and two children living, to wit: Mrs. Stearns and Zalmon Wheaton.

The plaintiff further introduced evidence tending to show, that John Stearns had absconded to Canada, about two years ago,

and a short time before the levy, and that his wife and children lived on and took care of the premises.

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The plaintiff then produced two written notices, one to Mrs. Stearns, and one to C. Davis, defendants' counsel, requiring them to produce a deed, from said Zalmon Wheaton to Mrs. Stearns, of the premises, and no deed being produced by defendants, and no copy of any deed being offered by the plaintiff, he offered Zalmon Wheaton as a witness to prove the contents of a deed, executed by him; which testimony was objected to by the defendants but was admitted by the court, and said Zalmon was sworn, and testified that he, on the 5th October, 1832, executed a quit claim deed of the premises to his sister, Mrs. Stearns, and that she, at the same time, executed a quit claim deed to the witness of some other real estate left by their father, and that there was no distribution of the real estate among the heirs by decree of the probate court, and that the widow of Caleb Wheaton had relinquished her right of dower, in consideration of a support, guaranteed by the witness. Here the plaintiff rested his case. It was admitted the defendants had issue born alive. The defendants requested the court to instruct the jury, that upon this evidence the plaintiff was not entitled to recover against both defendants, or either. But the court instructed the jury, that if they believed the said testimony, the plaintiff was entitled to recover possession of the premises, and costs, against both defendants;—to which decision of the court, in admitting parol evidence, in relation to the deed to Mrs. Stearns, and to the said instructions to the jury, the defendants excepted.

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C. Davis, for defendants.

Service of the notices to produce, &c. upon Mrs. Stearns, and upon her attorney, did not, under the circumstances, lay a foundation for the admission of secondary evidence, for two reasons—

1st. Because there was no such privity of estate or contract between the plaintiff and her, as to entitle him to call upon her to produce her title deeds, in order that he might, from them, draw some proof of the existence of property in her husband.

2nd. Because these notices were not preceded by any proof that she had a deed from her brother. This was necessary by all rules of proceeding. 1 Stark. Ev. 359.

The next question is, whether the usufructuary interest, to which the husband becomes entitled in his wife's lands,

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can be set off on execution, in satisfaction of his debts? If there be any authority for so doing, it must be derived from our statute, for the right to appropriate the real estate of the debtor, for this purpose, of whatever description, has no other source.

The act concerning levying executions, Sec. 3, provides, "that all houses, lands and tenements, belonging to any person, "in his or her own right in fee, *or for his own life or the life of another*, paying no rents for the same, shall stand charged, "with all the just debts and demands owing by such person," &c.

This is the only clause to be found in our statute, which affects the question; and yet, it is obvious, that the interest, which John Stearns had in his wife's lands, as described in the levy of plaintiff's execution, is not literally and in terms comprehended by it. It is not an interest belonging to him necessarily, for his own life, for it ceases upon the death of the wife; nor for the life of the wife, because it ceases upon the death of the husband. It is an interest limited to the duration of the coverture, resulting from it, and ending with it; and, though it is termed a freehold, it is not strictly a life estate. In one event, it may continue in the husband during his life, although he survives the wife, that is, when the wife had issue by him, capable of inheriting the land. But in this case, it assumes a new name—tenancy by the curtesy—has new qualities imparted to it, and is, with perfect propriety, termed a life estate. This change does not take place till after the birth of issue and death of the wife. Subsequent to these events, we do not deny that his interest comes within the purview of the statute, and may be set off on execution.

The continuance of the usufructuary interest of the husband, during the life of either party, depends upon another contingency, and that is, a divorce *a vinculo*. The husband's interest in his wife's lands ceases, absolutely, upon such a divorce, whether issue has been born or not; for this does not, like the death of the wife, constitute him tenant by the curtesy, nor does he become such after her death, when a divorce has occurred. Our statute of divorces, it is true, Sec. 4, authorizes the supreme court to restore to the wife all or any part of her lands, as if her lands, like her goods, were vested, absolutely, in her husband, by the marriage. Blackstone does not enumerate this, as an estate for life, yet, tenancy by curtesy he does. 2 Bl. Com. 126,

127, 128. Dane agrees with Black. Ch. 130. Art. 3, *passim*. Caledonia,
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But conceding that the husband's usufruct may properly be termed a life estate, because it may last for life, it is to be observed, that our statute does not subject all life estates to levy on execution for debt, but only two particular descriptions of them. Could an estate *de viduitate*, or an estate, granted till a certain sum be raised therefrom, both of which may possibly subsist for life, be comprehended in the act? We think not. We apprehend the true construction will confine it to such estates as are created by grant, to endure for the life of the grantee, or some other person, or such as the law raises, having the same definite duration, as tenancy by curtesy and dower. This is rather to be presumed, as the principal elementary writers, as Blackstone, Dane, Kent, &c. do not include this in their enumeration of life estates. Mattocks
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It is true, the two latter say, it may be set off or sold on execution; but they speak in reference to the laws of other states. 2 Kent's Com. 110. 1 Dane 342. Roper's Hus. & wife. 1, 3, 136, 54. Reeve's D. R. 27. 1 Swick, 26.

Neither of these two last writers intimate that it can be sold or set off.

To ascertain the value of the estate, the appraisers have not merely the common difficulty of calculating the probable duration of a single life, which, by the aid of Wigglesworth's tables of lives, or some others, might afford a tolerable approach to accuracy; but they must calculate the joint lives of husband and wife; and, if before issue born, the probability of such an event must constitute an element in the calculation,—a difficult point, we should think, to subject to mathematical precision.

In addition to all this, the possibility of absence beyond seas, or elsewhere, for seven years without tidings, and the probability of a divorce for some of the numerous causes indicated by our statute, must be taken into account. And how can it be possible, from elements like these, to arrive at any tolerable approximation to a just appraisal?

We infer, then, that it never could have been the intention of the legislature, to subject an interest, so uncertain in its duration, and liable to so many contingencies, to be extended upon execution.

Courts of equity go great lengths in preserving to the wife and
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her heirs, at her decease, her separate property,—not merely her freehold estates, but her chattels real. They regard any charge upon her lands, for the purpose of raising money for his benefit, as giving her the character of surety to him, and her estate entitled to exoneration out of his assets.

Bonds, notes and other choses in action, created by a sale of her separate estate, will still be treated as hers, so far as can be done, without interfering with his acknowledged power of appropriation, during coverture. Her right in them survives, upon his death, even though he may have been a party to them. This court has emphatically expressed their approbation of these principles, and evinced a determination to apply the liberal doctrines of courts of equity, in preserving to the wife her separate property, to cases at law, so far as they can do so consistently with the settled forms and modes of proceeding in courts of law. *Richardson v. Daggett*, 4 Vt. Rep. 336. 2 Kent's Com. 116, 120. 1 Rop. H. & wife, Ch. 2, *passim*. *Kenny v. Udal*, 3 Cowen's Rep. 590. *Compton v. Collinson*, 1 H. Bl. 334.

If, however, the court should be of the opinion, that this species of estate may be set off on execution, and that it was so legally done, in the present case, so as to give the plaintiff a right to the possession, we then contend, that this action should not have included the wife; that the husband alone, was liable. On this point, we think the authorities are too decisive to admit of serious controversy. Reeve's D. R. 27, 130, 131, 133, 135. 2 Kent's Com. 111. *Bobb and wife v. Perly*, 1 Greenleaf's Rep. 1 Dane's Ab. 332, 341, 343. 5 do. 645, 647.

Whatever rights creditors may have, or not have, in the husband's interest in his wife's lands, it is perfectly clear, from the authorities cited, that, during coverture, he has the absolute control of it, and alone can encumber it, assign it or lease it. In case of trespass to the growing crops, he alone can sue. Upon any covenants by lessee, as for non-payment of rent, the action can only be sustained in his name. If he dies, having rents due, or claims for trespasses committed, no remedy results to the widow. Both the right and the remedy pass to his executor. His title is as full and complete as it is to her personal chattels, or to her real chattels, when reduced to possession. He is under no necessity of joining his wife in the action, although he may do so, as in other cases, when she or her property may be the meritorious cause of action.

She having no interest whatever, until the determination of his use, by the dissolution of the marriage, no action can be maintained against her jointly with her husband, and none survives against her. She must be made a defendant in an action affecting her inheritance. In the case at bar, the plaintiff's claim is consistent with, and, indeed, is founded upon her estate. He sets up no title adverse to hers; the event, either way, can settle nothing as to her estate; it is but a contest between the husband and his creditor, for the possession of a temporary interest, created by operation of law, out of her lands, and which, however it may terminate, leaves her estate, present and future, wholly unaffected. If the creditor fail, the husband, as before, has the exclusive possession and enjoyment, with all his rights of alienation; if he succeed, the husband's interest is simply transferred to him, and, in either case, if she survive, or upon a divorce, she is instantly reinstated in the full enjoyment of her lands, as if no marriage had intervened. There is, therefore, no reason for making the wife a party in this suit, and no authority can be found to justify it. Nor is there any ground for the position, that she has done any act, personally, that can subject her to responsibility. She has, with her children, continued to reside upon the premises, since her husband's abandonment, as she did before. This occupation is the husband's occupation, as much as that of the minor children.

The wife having been improperly joined in this case, we are inclined to think the jury should have been instructed, that plaintiff could not recover against John Stearns, if even otherwise entitled to recover. There is no doubt but in torts, which may be joint or several in their nature, and when the action does not involve a joint contract, or proceed upon some supposed unity of title or vicariousness of character in the defendants, a recovery may be had against one, though others may be acquitted. But there are exceptions, and the present, we contend, is one. An eviction is stated by husband and wife, which could only be proved by showing some act of the former, in reference to, or affecting the estate of the latter; for, in ordinary trespasses committed by both in company, the law imputes the act to him only, and exonerates her; and, on failure to make out any such case, can the plaintiff choose his ground, and proceed upon the act of the husband alone? *Weall v. King et al.* 12 East. 452.

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If the court should be of opinion, that nothing, hitherto urged, is sufficient to prevent the plaintiff from having judgment against both, or one of these defendants, we have still another objection, and that is, that by virtue of our statute, when a creditor has extended his execution upon the land of his debtor, in the manner prescribed, and when the latter has omitted to avail himself of his right to redeem the premises set off, the former is, by operation of law, invested with full title and seizin of the same. The statute declares he shall have as full and ample power to enter, as though seizin had been delivered by the officer. If seizin had been formally delivered by an officer, under a writ of possession, could ejectment be maintained against the former tenant without a fresh act of eviction? Surely not. In this action, the plaintiff seeks to recover that, of which he is already in full possession. It presupposes the plaintiff to be out of possession, and the other party in, when in truth, in contemplation of law, the reverse is the case, in both respects. If, in point of fact, in such case, the former tenant intermeddles with the premises, he may be liable in that species of action of trespass, which supposes the plaintiff to be in possession, and the opposite party to be depredating upon that possession. This objection, if well founded, may be insisted upon by both or either of the defendants.

William Mattocks, pro se.

The levy being legal in point of form; and the land not deemed and defendant in possession, the case presents two questions. First, is the wife properly made defendant? Second, is Stearns' life estate, under our statute, liable to be set off to pay his debts?

I. Both must be sued, when both are in possession, the husband claiming in right of his wife. Reeve's D. R. 135—6. Bro. 67. Roll. Abr. 660.

Holding over, after the title becomes absolute in the levying creditor, is, by statute, trespass, for which ejectment lies.

It is a general rule, that all persons in interest be made parties, and all, who participate in the tort, may or must be made defendants. 1 Chitty, 2, 65.

The wife, in this case, is interested, claiming that plaintiff takes nothing by the levy, and that she cannot be ousted.

In torts, the wife, if participating, may be joined, if interested in

the trespass, unless under the actual or presumed coercion of the husband. Reeve's D. R. 72, 74, 135—6. 1 Chitty, 65, 81. 1 Swift's Digest, 28, 29. 1 Selwyn's N. P. 220. 2 id. 702. 1 Swift's System, 199, 200.

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Stearns was in Canada before and ever since the levy, which does away all presumption of coercion. 2 Starkie's Ev. 704.

Since the husband is tenant with the wife, in possession of her tenement, they will be jointly liable for the rent reserved, as they would be upon an estate granted to both during coverture. Hammond on parties, 206. So, for waste, or for not repairing division fence, id. 207.

In suing on liabilities by both, during coverture, she must be joined. Id. 214, 240.

II. By marriage the husband acquires a freehold estate during their joint lives, in such freehold estate of inheritance, as the wife was seized of at *that time*, or may come to her during coverture—And, if tenant by curtesy, during his life. 1 Roper, 3, 5. Reeve's D. R., 28. 4 Kent's Com. 27, 28. 2 Black. Com. 128, 433. 1 Swift's D. 28. 1 Cruise's Dig. 107.

He has her chattels real by survivorship. Reeve's D. R. 22, 24. 2 Black. Com. 435.

He may charge her estate with his debts, during their joint lives, and, if tenant by the curtesy, during *his* life. 1 Roper, 136. 2 Kent's Com. 112, 113. Reeve's D. R., 22, 26, 27.

Her separate property is liable for his debts. 2 Roper, 138, 9.

He may sell her chattels real, or dispose of them by will. 2 Black. Com. 434. 2 Kent's Com. 109, 111, 142. 1 Roper, 166—7—8, 181. 1 Cruise's Dig. 178.

He may assign a judgment or *elegit*, sued out by her before or after marriage. 1 Roper, 174 to 180.

Husband surviving wife has her mortgage right. Reeve's D. R., 30. Roper, 5.

In case of his bankruptcy, assignees may take the whole annual income of all her lands, making allowance to her. 1 Roper, 276.

In short, he has the entire control of her property. 1 Swift's Dig. 18, 26.

This very estate can be sold. 2 Kent's Com. 111. 1 Dane's Abr. 342.

Thus it appears that the husband has a freehold estate, for

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their joint lives, and if tenant by curtesy, (which Stearns is, in this case,) in the wife's land, during his life, has the entire control of it, and it follows, as a natural and legal consequence, in countries where provision is made for creditors to take debtors' lands for debts, by sale or appraisal, that this kind of title may as well be taken, as title to land, owned in fee by debtors.

With respect to the propriety of proving the contents of the deed, from Wheaton to Mrs. Stearns, by parol, after notice to produce it, and no excuse for not producing it, it is too clear to admit of argument.

It is settled law, that when a paper is in the hands of the defendant, after notice to produce it, the contents may be proved.

The opinion of the court was delivered by

REDFIELD, J. It is first to be inquired, whether the county court committed an error in admitting parol proof of the contents of the deed from Zalmon Wheaton to defendant, Lydia Stearns. Whether the existence of the deed should have been first proved, and then notice to produce the original shown, in order to lay the foundation for secondary evidence of the contents of the deed, is not now very material; as it is a mere question as to the *modus operandi*. Most unquestionably, this would have been more in accordance with the received forms of proceeding, and such, no doubt, was the order of proceeding in fact, in the court below, but in stating the case, that order is reversed, and the notices to produce the deed are shown before the existence of the deed itself is proved. This course might sometimes happen from its being conceded on all hands, that some such instrument did once exist. But, in either case, as no question, as to the *order* of introducing the evidence in the court below, was made, and the *existence*, as well as the contents of the deed, was shown, it only remains to determine whether, from the whole case, such proof was properly admitted.

The deed was executed to the wife. It is presumed to continue in her possession, or that of her husband, unless the contrary be shown. As it is only optional with the party, whether he will record his deed, we cannot presume any deed to have been recorded. If not recorded, it could not be proved by an office copy from the town clerk, nor would it be in the plaintiff's power to produce any copy of the deed. He must, of course, resort to mere oral evidence of the contents, unless he could procure the original deed. This he should do, if in his power.

He must make all reasonable efforts to procure it. As he has not the custody of the paper, nor power to compel the opposite party, in whose possession it is, to surrender it, he can only request them so to do, and this he must do, and in reasonable time, to permit them to produce it, if they see fit. If they refuse to produce the original, he may then resort to the best evidence in his power, which, in this case, it has been seen, was produced, i. e. oral evidence of the contents of the instrument. The only remaining doubt, then, rests upon the character of the request or notice to produce the deed.

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We think this was sufficient. The party, wishing to prove a paper in the possession of his antagonist, cannot be required to follow him to the world's end, to request the production of the original. All that is or can be required, is reasonable notice. This, we think, was given in the present case. If the party was not within the State, the notice to the attorney was all that could be required.

The freehold title of the wife being made out, and the plaintiff's levy being admitted to be formal, and it being also admitted, that the defendants had issue born alive, it only remains to inquire whether the defendant, John Stearns, had such an estate in the land, as was liable to be levied upon by his creditors.

The statute provides that, "any estate, held by the debtor in his own right in fee, or for his own life, or the life of another, paying no rents therefor," shall be subject to be levied upon.

We see no difficulty in considering this an estate, which the debtor held in *his own right*. The title was, indeed, derived through the right of his wife, but, by virtue of the marriage, he, as husband, acquires certain rights, among which, the use of the freehold estate of inheritance of the wife, during the coverture, is one. After issue born alive, this estate is enlarged and extends not only during the coverture, but till the death of the husband, except in one event, which will be named hereafter. This, in England, after the death of the wife, was denominated an estate by the curtesy, but is strictly an estate, which the husband holds in his own right, whether before or after the death of the wife. He may bring trespass or ejectment in his own name, for any injury to the usufruct during the continuance of his estate.

The next inquiry is, whether this is *an estate for the life of the debtor*. It is undoubtedly true, that this estate might be

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determined by a divorce, *a vinculo*, before the death of either husband or wife. But this is a contingency of so remote expectation, as not to enter into the ordinary calculations of the duration of the relation of married life. It is one of those extreme cases, which, like earthquakes and tempests in the natural world, or like public executions in the history of individual existence, do, indeed, sometimes occur, but which no one feels bound to expect or to provide against.

This, then, is an estate for the life of the debtor, depending upon this remote contingency, which no honest or prudent man could anticipate in his own case, and which the law cannot regard until it occurs. And should the contingency happen, and thus the estate of the levying creditor be determined, it is no detriment to the debtor, nor has he any just cause of complaint. His debt is paid, and the loss and risk, if any, fall upon the creditor.

But if this were a contingency still less remote, it would not change the character of the estate.

An estate to a woman *durante viduitate*, or *dum sola*, or to a man, *so long as he shall dwell in a particular house*, are all estates for life, although each particular class of those estates, is liable to be determined any hour, and that during the life time of the person, by the term of whose existence the estate is otherwise to be measured. 1 Cruise's Digest, 77. 1 Institutes, 42, a.

This mode of levy upon the entire estate of the debtor, by appraisal to the extent of the metes and bounds, by which the levy is described, is the only mode ever practised in this State; and the only one, we think, which is consistent with the statute. In some of the States, the creditors who levies upon the husband's estate, in the lands of the wife, is put by the officer in the receipt of the yearly issues, until the debt shall be paid. Such has not been the construction given to our statute upon this subject.

The cases, relied upon by the counsel for the defendant, do not seem to impugn the general doctrine here established.

In the case of *Barber v. Root*, 10 Mass. Rep. 260, the levy upon the estate of the wife was, indeed, in the manner last named, but was a levy under a statute differently expressed from our statute upon the subject, and it was doubted whether the levy was good under the Massachusetts statute, and the case

was finally decided upon the point, that the divorce divested the estate of the husband in the lands of the wife. Upon this question there can be no doubt.

The case of *Robb & wife v. Perley*, 1 Greenleaf's Rep. 6. is not in point, to show either the mode of the levy or the estate liable to be levied upon. The form of the levy was the same as in the present case, and the estate levied upon, was the freehold of the wife, in an uncultivated state. The court held the levying creditor liable for waste, on the ground that the estate of inheritance was in the wife, and for any injury to that, she, together with her husband, might sustain an action; and as the levy in that case, could at most, only extend to the usufruct, it could not protect defendant, as there could be no use of wild lands, without first committing waste, which the creditor has no right to do.

The result is, that the levy upon the entire estate, to the extent of the metes and bounds, must be esteemed the only correct mode here. And we cannot doubt that the husband's interest in the wife's estate of inheritance, after issue, is such, that his creditors may levy upon it.

But upon the question of the joinder of the wife, we entertain no doubt. The wife could not be guilty of a disseizin for any act done in company with or by the presumed coercion or direction of the husband. The act would be that of the husband and not of the wife.

Had this been a suit where the title of the wife, and her rights were to be adjudicated, it might be very proper to join her in the suit.

But plaintiff's levy could only reach the estate of the husband. The estate of the wife is not in controversy. There is no more reason why the wife should be joined in this suit, because she remained on the premises after the expiration of the time given the debtor by law to redeem, than there would be in joining the children or servants of the husband.

And as the plaintiff has alleged a disseizin by husband and wife jointly, there may be some propriety in rejecting proof of the disseizin by the husband alone. If a plaintiff allege a trespass committed by defendant's cattle, he cannot be permitted to prove a trespass committed by the defendant in person.

The declaration, in this case, of a disseizin committed by

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husband and wife jointly, is, in the language of the law, declaring upon the act of the wife. For if it be the act of the husband alone, the wife could not be joined. But as this is merely a question of variance, the plaintiff is permitted to amend by striking out the name of the wife, upon terms.

It is now alleged in argument, by the defendant, that there has been no disseizin by the husband, but that by operation of law, after the expiration of the time given to redeem, the seizin being cast upon the creditor, the mere fact of the debtor continuing in possession does not amount to a disseizin, but is a holding by legal permission of, or in subordination to the title of the plaintiff. It is true, the debtor is made liable for rents during the term given him for redemption, but if he continues to hold and occupy the premises after the term has expired, he is a wrong doer, and liable in ejectment.

The judgment of the County Court is affirmed.

GEORGE W. SCOTT & Co. v. SAMUEL & GEORGE W. SAMPSON.

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In an action of book account, where the "debit side of the plaintiff's book" is made to exceed one hundred dollars; by the entry of items, which the party had no right to charge on book, and which he did not insist upon as a ground of recovery, the jurisdiction of the court is not affected by such entry.

This was an action of book account, sued before a justice of the peace, and brought into the county court by appeal, where judgment to account was rendered by consent of parties, and the case was referred to an auditor, who reported a balance due the plaintiff, and also stated certain facts, as the foundation of the report, upon which the defendants moved to dismiss the action, for want of original jurisdiction in the court where the suit was brought. That motion was overruled by the court below and judgment rendered on the report, to which decision the defendants excepted, and exceptions being allowed, the case comes here for revision of that decision.

The facts, necessary to the understanding of the motion to dismiss, are as follows:—

At the time of auditing the account, the plaintiffs presented a transcript from their *leger*, which showed on the debit side a sum total of \$123, 79, and, to reduce that sum below one hundred dollars, the plaintiff proved that an item in the account, described as "brought from minute book" and under the head of articles "delivered to Samuel Sampson," being \$27,98, was delivered to said Samuel Sampson on his sole credit, and had been transferred to the joint account, on the naked verbal promise of the other defendant, made long subsequent to the delivery of the articles, and without consideration.

The plaintiff formally withdrew the claim and did not in any way insist upon it, as part of the account, at the time of the audit.

C. Davis, for defendants.

In determining the question of jurisdiction, the court will not first try the whole merits of the case, ascertain for what portion of the Plaintiff's account he is entitled to recover, and what not, and then let the question of jurisdiction abide this result.

If this doctrine were to obtain, it would be premature to entertain questions of jurisdiction until after the coming in of the auditor's report.

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The only proper inquiry is, was this charge deliberately made, by the plaintiffs themselves, without mistake—if so, it is *bona fide*, as against themselves, a part of their account.

The case of *Stone v. Winslow*, 7 Vt. Rep. 338, is a strong case in point. The court there say emphatically—that the question of jurisdiction is to be determined from inspection of the plaintiff's books, and not from an investigation of the merits.

H. P. Smith, for plaintiffs.

The item of \$27.98, is no part of the plaintiffs' account against the defendants. And there is no rule of law, which will admit of this item being audited, adjusted or recovered in this action. It now stands as originally charged, on a separate book, against Samuel Sampson, and he is alone liable to pay it, and it can only be recovered by an action against him alone. The item being transferred to the joint account of the defendants, does not change the nature and original character of the account or the liability of the defendants, as joint debtors to the plaintiffs.

The promise to pay the subsisting debt of Samuel Sampson is void under the statute, and was not a subject of book charge.

The opinion of the court was delivered by

REDFIELD, J.—The question of jurisdiction, submitted to the court for determination, is made by statute to depend wholly upon the amount of the "debit side of the plaintiffs' book." How far the court might feel themselves justified in adopting a literal construction of this statute, if the matter were *res integra*, is not now to be inquired. It has been adjudged that the court, before whom the suit is brought, may so far look into the character of the charges, constituting the plaintiff's account, as to permit him to withdraw mere erroneous entries, which were not intended to form part of the account. *Cullen v. Aiken*, 5 Vt. Rep. 177. This is the case, were the party never intended the charge should have been entered in the account. It requires no argument to show the absurdity of the contrary doctrine. For although it may be true, that no man ought to be permitted to allege against his own act, it can hardly be contended that the error of any one shall deprive him of an opportunity for repentance and restitution. In the case of *Stone v. Winslow*, 7 Vt. Rep. 338, it was held that a mere right to claim interest on an account, which the party did not insist upon, could not be

set up by the opposite party to oust the court of jurisdiction of the case. It was decided in the case of *Brush v. Hurlburt*, 3 Vt. Rep. 46, that a mere fictitious offset could not affect the right of appeal. In a case decided upon the present circuit, a similar point to the one here discussed, was submitted to the consideration of the court. (*Phelps & Bell v. Wood*, Addison county.) The court had no difficulty there. We all felt very well satisfied with sustaining the jurisdiction of the justice of the peace. It is true, there may be a plausible ground of argument, that, as the legislature have seen fit to fix the criterion of jurisdiction, in actions of this character, in the plaintiff's book, it should be determined by that, and that only, and upon inspection of the book simply. But it is to be borne in mind, that the book is no part of the record, even after oyer and a formal profert. For the party may make profert of a mere transcript, and is, in no sense, bound by the account exhibited on oyer, so that the whole proceeding is, so to speak, "a mere child's play." The court must, then, look out of the record to find the book, and must make some inquiry, so as to determine whether it be the plaintiff's book. And we find no difficulty in saying the court, before whom the suit is pending, may go farther, and ascertain whether the plaintiff's charges were understandingly made, and whether they were of a character, which he had a right to charge on book.

For if the charges were entered by mere mistake, (*Catlin v. Aiken*,) or if they were of a character, not the subject of book charge, i. e. damages for tort or breach of contract, the price of real estate sold, money paid to be applied, but not applied, upon an outstanding contract, they do not become a part of the account by being entered there. It may be treated as a *memorandum* of a transaction, but can never be considered a *charge in account*. The "debit side of the plaintiff's book," would be neither more nor less, on account of such entries. They should be treated, as in fact they are, to all intents, in relation to an account between party and party, as a mere nullity. This principle will apply with full force to the question under consideration. For the facts disclosed not only show that the plaintiffs had no good ground to charge the "item brought from minute book," to the joint *account*, but they had no possible ground of recovery, in any form of action, against the defendants jointly. The case is not different in principle, from what it

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would have been, if the plaintiffs had carried all their account against the defendants, separately, to the joint account, without consulting *either* of the defendants, or they had done the same by mere mistake, or to save time or space in posting. In neither of which cases, could it be contended, with much plausibility, that it formed a part of the joint account, so as to affect the jurisdiction of the courts.

And in this case, the books, taken together, do not, in fact, show more than one hundred dollars *originally* charged to the defendants jointly, but simply a *combining* of the accounts in *posting, without authority*.

But even when it is conceded that the party makes the entries in good faith, and understandingly, expecting to recover the amount in the *name of account*, but is mistaken in his right, such mis-entry may always be corrected, either by erasure or credit, or in any other mode, (and the more obvious the original entry, the better for the credit of the book,) and the account is the same, as if such entries had never been made.

The judgment of the county court is, therefore, affirmed.

WILLIAM MATTOCKS v. SIMON JUDSON.

Caldoonia,
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If an execution issue irregularly, it may, on motion, be set aside. If issued prematurely, and the bail are injured, the bail, in a *scire facias* against them, may shew that fact by plea.

On demurrer to a writ of *scire facias*, the court cannot notice, either that the execution issued within twenty-four hours, or that it was not issued by permission of the judges.

This was a *scire facias* against defendant, as bail, on mesne process, of Aaron Bellamy. The defendant, after oyer of the original execution against Bellamy, demurred to plaintiff's declaration. Joinder in demurrer. The execution and previous proceedings in the original suit were regular on the face of them. But defendant insisted that, in point of fact, the execution was issued within twenty-four hours after the rendition of the judgment, upon which it was founded, and sought to avail himself, under the demurrer, of such alleged irregularity.

The case was argued by

C. Davis, for the defendant, and

W. Mattocks, pro se.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The defendant contends, that the execution against Bellamy issued prematurely, that is, within twenty-four hours from the rising of the court. The statute, 95th Sec. of the Judiciary act, proviso, is, "that no execution shall issue on any judgment rendered by either the supreme or county court, until twenty-four hours after the rising of such court, unless by the special permission of the judges of said court." Whether the bail can avail themselves of such an irregularity in the issuing the execution, is somewhat questionable; but if they can avail themselves of it as a defence to the *scire facias*, it must be shewn to the court by plea. The writ, in the case before us, to which there is a general demurrer, is apparently good. On examining the record, the judgment against Bellamy is regular. If the execution issued irregularly, it might, on motion, be set aside; or if it issued prematurely, and the bail was injured, the defendant in this *scire facias* might have shewn it by plea. But on this demurrer, the court cannot discover, either that the execution issued within twenty-four hours from the rising of the court, or, if it did, that it was not issued by the

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special permission of the judges of the court. The minutes, made by the clerk, of the time of the rising of the court, and of the issuing of the execution either with or without such permission, are no part of the record of the judgment. The writ of *scire facias*, in this case, for any thing which appears, is sufficient, and judgment must accordingly be entered for the plaintiff.

WILLIAM S. FLINT v. IRA DAY.

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Where a person, not a party to a note, signs his name on the back, without any words to express the nature of his undertaking, he is considered as a *joint promisor* with the other signers, and if any of the other signers are merely sureties, he is considered as a *co-surety* with them.

This was an action of assumpsit for money paid, laid out and expended. Plea, the general issue. The plaintiff proved that he, together with one other, signed a promissory note for \$200, payable to the Bank of Montpelier, as sureties for George W. Paige, who also signed the note. Paige gave the note to defendant, he being one of the directors of the Bank, with a request to him to get it discounted at the Bank, but with no request to sign it, as surety.

The Bank declined discounting it, without some further assurance that the note was good. The defendant, to induce the Bank to discount the note, wrote his name upon the back of the note, saying, at the same time, he knew Flint to be good, and was not afraid to "back" the note. The note was thereupon discounted, it being dated some days previously. The money was paid to defendant, and by him paid to Paige, the principal in the note. It was also proved that plaintiff had been compelled to pay the whole amount of the note, and costs of suit. The county court directed a verdict for plaintiff for one third the amount of debt and costs, which he had been compelled to pay, subject to the opinion of the Supreme court upon the foregoing case, such judgment to be here entered, as the county court should have rendered.

L. B. Peck, for defendant.

1. The defendant's liability is that of a guarantor. He could not, as between himself and the Bank, be considered as a joint promisor. The character of the undertaking depends entirely upon the intention and understanding of the parties at the time. Here, the language used by the defendant, at the time he indorsed the note, that "he knew the plaintiff to be good, and was not afraid to back it," plainly shows that he only intended to make himself liable in case the maker made default. The undertaking of the defendant, probably, amounted to an absolute guaranty, falling within the principle of the decisions in New York. The doctrine of the Massachusetts cases has not been recognised here. Should this court be inclined to follow the decisions in the latter State, the present case may be clearly distin-

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guished from them, for here it is apparent, that the defendant did not mean to bind himself as an original promisor, while, in the former cases, there was nothing to limit or qualify the indorsement.

II. It is not material to the defence, whether the court adopt the New York or Massachusetts rule. In every instance, in the latter State, where the indorser has been held as maker, the question arose in a suit between him and the payee; here it arises between the maker and indorser, which presents a different inquiry, that is not at all affected by those decisions. The relation of the plaintiff and defendant to the Bank may have been that of joint promisors, while, between themselves, the defendant may have been a mere surety for the plaintiff; and such is the true situation of these parties. The defendant's name was put upon the note without the request or knowledge of either of the signers, and for the purpose of inducing the Bank to discount it for their benefit; and it does not even appear that he knew whether the plaintiff was principal or surety. There can be no doubt, however, from what took place when the note was discounted, that the defendant indorsed it on the responsibility of the plaintiff, and with the belief that he was able to, and would pay it. The result is, then, that the defendant was surety for the plaintiff, and that the latter cannot call on the former for contribution. This view of the case is fully supported by the opinion of Lord Eldon, in *Craythorne v. Swinburne*, 14 Ves. 159, and by *M Donald v. Magruder*, 3 Peters' Rep. 470.

B. N. Davis, for plaintiff.

1. It is well settled, in this State, that the defendant, by his indorsement of the note, made himself a joint promisor. *Knapp v. Parker*, 6 Vt. Rep. 642. And in Massachusetts. *Hunt v. Adams*, 5 Mass. Rep. 358. *White v. Howland*, 9 do. 314. *Moies v. Bird*, 11 id. 436. And in New York. 13 Johns. Rep. 175. 14 do. 349.

2. If defendant is holden to be an original promisor, it follows that he is to be treated as a co-surety, with the plaintiff and the other signer, for Paige; for plaintiff did not request him to indorse the note,—and although there is no evidence that Paige requested him to sign, yet he made defendant his agent to get the note discounted, and it is to be presumed that defendant's doings were in pursuance of the agency, and by receiving the money after defendant's indorsement and the discounting of the note, Paige adopted the acts of his agent.

Defendant's saying he knew Flint to be good cannot alter the nature of the contract between himself and Paige, as defendant might be willing to incur the risk of becoming responsible for Paige, if he knew his co-sureties were good.

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3. Defendant is liable to the contribution assessed by the jury under the direction of the court. 2 Starkie's Ev. 105. 11 Mass. Rep. 359. 17 id. 464. *Lapham v. Burns, et al.* 2 Vt. Rep. 213.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—If Day, the defendant, is to be considered as a co-surety with the plaintiff for Paige, then the judgment of the court below is to be affirmed. On the contrary, if he is to be considered as only guarantying to the bank the note signed by Paige, Flint and another, there is no foundation for this action. By the decisions of this State, it has been considered, that if a person, not a party to a note, signs his name on the back, he is treated, *prima facie*, as a joint promisor, unless there is evidence to control this *prima facie* inference. In the case of *Barrows v. Lane & Benham*, 5 Vt. Rep. 161, the court intimated that this was probably the better doctrine. In the case of *Knapp v. Parker*, 6 Vt. 642, the declaration was on a note, signed by the defendant on the back, and after it became due. The decision of that case governs the question now before us, and must be considered as a decision adopting the doctrine upon the subject, which has been adopted in the State of Massachusetts, rather than the one which prevails in New York. In this view, the case presented is the common one, of a person executing a note for the purpose of obtaining a discount at a bank, and obtaining signatures from time to time. In such a case, each subsequent signer may have had regard to the previous signatures, but all the signers are to be treated as sureties between themselves. From the case itself, it is sufficiently apparent that Paige was the principal, and that he was so known and recognized by the defendant. It is, however, not very material whether he so considered it or not. From the manner in which he signed the note, he became a joint principal to the bank, and must stand in the relation of a co-surety with the plaintiff, who did not request him either to be a guarantor or co-surety.

Having this view of the nature of the undertaking of the defendant, the case comes within the principle decided in the case of *Lapham v. Burns & Hitt*, 2 Vt. Rep. 213, which was

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much examined and considered by the court. Indeed, this case cannot be distinguished from that, except from the declaration made by the defendant, at the time the note was discounted, and this cannot vary it, as it was not a declaration made either to Paige or to the present plaintiff, and cannot control the obligation which he assumed.

If the defendant had executed a collateral guaranty to the bank, instead of obligating himself in the manner he did, he case would have come within the principle decided in *Craythorne v. Swinburne*, 14 Vesey, 159. Such, however, was not his undertaking. The case of *M' Donald v. Magruder*, 3 Peters, 470, is not similar to the present. Indorsers are not co-sureties, but their undertaking is separate and successive. The result is that the judgment of the county court be affirmed.

ESSEX COUNTY.

MARCH TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAS, *Chief Justice.*

" JACOB COLLAMER. } *Assistant Justices.*
" ISAAC F. REDFIELD. }

SAMUEL A. PEARSON v. JOHN M. FRENCH.

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No intendment will be made in favor of a plea in abatement. In such plea an argumentative allegation is bad on demurrer. A plea in abatement, for defective service, must show that the service attempted was defective, and that the writ was not served in any other way.

If an attachment of personal property be begun on Saturday night, before the going down of the sun, it may be completed at the first convenient time after.

In deciding the sufficiency of a plea in abatement, the court will not look into the writ and officer's return, unless they are referred to in the plea.

This was a suit brought before a justice of the peace, and came into this court by appeal. The defendant pleaded the following plea in abatement at the May Term of the county court, 1835, which was entitled *June Term, 1835.*

" And now the said defendant comes here into court, and prays judgment that said suit abate, and the plaintiff prosecute the same no farther, because he says that, although the plaintiff's writ was served by copy, as is named in the return on said writ,

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yet said copy was left with the defendant, and served on him after sun-down, on Saturday night, on the 13th day of Dec., A. D. 1834, by the officer authorised to serve the same, and at no other time, which is contrary to the statute, in such case made and provided, and this the defendant is ready to verify; wherefore the defendant prays judgment of said writ, that the same writ abate, and for his costs."

To this plea there was a special demurrer and joinder.

Young & Wells, for plaintiff.

Steele & Weed, for defendant.

The opinion of the court was delivered by

REDFIELD, J. No intendment is to be made in favor of a plea in abatement, but every reasonable intendment should be made in favor of the regularity and sufficiency of the proceedings. And here, as the defendant has not made the writ and officer's return a part of his plea, by craving oyer, and setting them forth, or indeed, by *referring* to them, we cannot look beyond the plea to cure any of its defects. The plea is demurred to, and we must decide its sufficiency. And we think it defective in many points, of no great importance practically, but technically fatal to the plea. *Slayton v. Chester*, 4 Mass. Rep. 478.

I. The plea is intitled of an impossible term of the court, and would thus seem to have been pleaded in vacation, after the first continuance, and on that account, not in time. But if this is cured by reference to the filing,

II. There is no direct allegation that the service was made by copy, but the allegation is *argumentative*, i. e. "although said writ was served by copy," &c., which was bad.

III. It is not alleged that the writ was not served in some other mode. And the court will not intend that the writ was not served by reading, as it might be, after this service was found defective. And it is not alleged that some *other* copy was not left, but only that this copy was not left at any *other* time; and some other copy might have been left previously, and still the plea have been true.

IV. The plea does not allege that the day, on which this copy was left, was the last day, on which, by law, the service could be made. If the service might have been made on the Monday following, and the sun was so nearly down on Saturday, that the attachment could not be completed until after sun-down, the

property might be taken by the officer, and a copy left on Monday, and if six days intervened before the return day of the writ, it would be in time. That might have been done in the present case, and still the plea be true. Or if the copy, left on Saturday night, had remained till Monday, it would hardly be necessary for the officer to take the copy and redeliver it, or to deliver another copy. And it is at least questionable, whether, if the attachment was begun in time, it might not legally be completed afterwards; but this is not considered or decided. The plea being manifestly defective in other particulars, the

Judgment of the county court is affirmed.

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NATHAN BEECHER v. JOSIAH PARMELE and two others.

If two persons own equal parts of a lot of land in severalty, but not divided by any visible monuments, if both are in possession of their respective parts for fifteen years, acquiescing in an imaginary line of division during that time, that line is thereby established as the divisional line.

That line, in such case, will be considered as drawn through the centre, in such manner as to leave the parts equal and as nearly similar as possible, unless the parties have evinced a consent that it shall be otherwise drawn, in which case their consent or acquiescence will govern.

The proprietor of land, having right to immediate possession, may expel a mere intruder upon the same, by such force as may be necessary, and he will, in any event, acquire a rightful possession of the land, and if he be guilty of a breach of the peace or a trespass upon the person of the intruder, he must answer for that.

The declarations of one in possession of land, whether as tenant or proprietor, are evidence (as against those who derive their possession through him,) of the manner in which the land has been occupied.

The party is not obliged to show such declarations by the person making them, although he be living and a competent witness.

This was an action of trespass on the freehold. Plea, the general issue and trial by jury. The principal question was one of boundary. The lot of land in controversy was called lot No. four, in the second division of lots in Canaan, in said county. It was admitted that plaintiff had title to the southerly half of said lot, and those, under whom defendants claimed, had title to the northerly half. The whole lot was in a triangular form, nearly equilateral. The parcel of land in immediate controversy, was called by way of distinction, the "*barley piece*," and had been first partly cleared by defendants, claiming to hold it as tenants to one Buckminster, he having a deed of the northerly half of said lot. The testimony tended to show, first, that said lot had never been divided but that plaintiff and defendants, and those under whom they claimed, had occupied the land in severalty, for more than twenty years, one claiming the south and the other the north part of the lot, by the description of the "south half," and the "north half," each having made improvements, near the point of a line from one apex of the triangle to the centre of the opposite side, thus evincing an expectation that the lot should be divided at or near that point. Upon this part of the testimony, the court instructed the jury, that if, for more than fifteen years, the parties, and those occupying the different parts of the lot, had acquiesced in an equal division of the land, by a line passing in

that direction, the jury would consider the line of division drawn from the apex of the triangle to such a point in the opposite side, as would leave the quantity of land equal on both sides of the line. The testimony also tended to shew that, more than thirty years ago, the land had been divided by actual survey, and a line spotted, which had, ever since, been acquiesced in by the occupiers of the two halves of the lot. The jury was instructed that, if this was the fact, the line would govern as to the division of the lot, notwithstanding there was more land upon one side of the line than the other. There was testimony tending to shew that the defendants had, thereafter, partly cleared the "barley piece." The plaintiff forcibly, but not by breach of the public peace, took possession of the same, and continued to occupy till the defendants entered and took away the barley, as set forth in plaintiff's declaration. The defendants contended that, having once taken possession of the land under claim of title by deed, they were not liable to be sued as trespassers by the owner of the land even, who had entered upon their possession, and was in quiet possession at the time of the defendants' entering and carrying away crops raised by plaintiff, and requested the court so to charge, but the court refused so to charge, but did charge upon this point, that if the land was the plaintiff's, and he in quiet possession, and defendants entered forcibly upon him, as above stated, he should recover. There was testimony tending to shew that one Boothe had been in possession of that half of the lot, occupied by defendants, some thirty years ago, and that he had, while in possession, admitted the existence of a line of division, which would not include the "barley piece," on his half. The court instructed the jury, that this testimony was to be weighed for the purpose of determining what line of division, if any, had been acquiesced in by the occupants of the two parts of the lot. To all which instruction the defendants excepted.

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T. Bartlett, for defendants.

I. The defendants were in possession, claiming to hold the land by deed, at the time of the plaintiffs' entry upon their possession.

II. The defendants had made improvements thereon.

III. Ejectment, and not trespass, is the proper form of action to try the title to the land in dispute. The defendants entered and made improvements, as tenants to Buckminster, supposing

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that they had a good title and right of possession, and they are entitled to their "betterments" in pursuance of the statute. And the entry of the plaintiff upon the defendants' possession cannot be justified or supported by any decision upon this subject. If the plaintiff could thus enter and usurp possession by force and keep out the defendants, even supposing the title of the *locus in quo* to be in the plaintiff, he thereby deprives the defendants of the benefit of a remedial statute of this State, known as the act in relation to betterments. It is believed that no reported case can be found, where it has been decided, that the owner of land may enter and dispossess the occupant, who claims to hold the land by deed, having entered under color of title, and made improvements. The full extent of the authorities upon this subject is, that the owner of land may enter upon any one he may find in possession, who has nothing but a bare naked possession, without color of right or title, and dispossess him. *Hyatt v. Wood*, 4 Johnson's Rep. 150.

IV. The defendants contend, that the county court erred in not rejecting the evidence of Boothe's admissions, and in the instructions given to the jury in relation to the said evidence. Because,—

1. That evidence was liable to all the objections, which appertain to hearsay testimony, and for aught that appears, Boothe is now living and within reach of the process of this court.

2. It does not appear that Boothe ever had any interest in any part of said lot, and, for aught that appears, was a naked trespasser, and wrong-doer, while in possession of that part of the lot now claimed by the defendants.

3. The court should have instructed the jury, that said testimony ought not to be weighed by them, not having any tendency to prove or disprove the issue—for a freehold cannot pass by parol.

W. Heywood, for plaintiff.

I. The first point in the charge of the court was right. A division of the lot, in the manner specified, would give the plaintiff the southerly half, and the defendants the northerly half of the lot, according to their respective interest in it.

The occupation of the land in this manner, for fifteen years, affords presumptive evidence of a division agreeably to the manner in which it was occupied. *Mitchell v. Walker*, 2 Aikens' Rep. 266. *Skumway v. Simons*, 1 Vt. Rep. 53. *Hazard v.*

Martin, 2 id. 77. *State v. Wilkinson*, 2 id. 480. *University v. Reynolds*, 3 id. 542. *Stevens, Administrator, v. Griffith et al.* 3 id. 448.

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II. In analogy to our statute of limitations, fifteen years possession affords presumption of a right. Under the English statute, twenty years uninterrupted enjoyment is a bar to an action of ejectment, and in analogy to this statute, after twenty years uninterrupted enjoyment, the courts of England have directed the jury to presume a deed, a record, and even impossibilities, in order to quiet the possession. 3 Stark. Ev. 1214 & Seq.

The courts in Vermont, in the cases above cited, have followed the English cases, in the doctrine of presumptions.

III. Under the charge of the court, the jury must have found that the title to the "Barley piece" was in the plaintiff. The defendants, as trespassers, went on to it and partly cleared it, when the plaintiff entered and took possession of it, as he had a perfect right to do, provided he could do it without a breach of the public peace. The plaintiff finished clearing it, and sowed it to barley, and it remained quietly in his possession till the barley had ripened, when the defendants forcibly entered and took the barley. Possession is necessary to maintain trespass. In this case, the plaintiff had the possession and the title. What bearing then, has the fact, that, some months previous to the trespass sued for, the defendants had illegally the possession of the premises?

IV. The sayings of Boothe were admissible, upon the ground that they were against his interest. It is a general rule that hearsay evidence, in questions of boundary, are admissible. 1 Stark. Ev. 65. 3 id. 1207.

The opinion of the court was delivered by

REDFIELD, J.—If an entire lot be owned by different proprietors, who are in possession of separate parcels of the lot, and a divisional line is acquiesced in for fifteen years, it is thereby established. If no line of division be in fact drawn, but the parties acquiesce in an imaginary line of division, this is the same as if the line had been marked by visible monuments. If a person own the whole of a lot, and convey a given number of acres off one end, or one side, this is to be understood by a line parallel to the lot line. If two own a lot in equal portions, in severalty, but in fact not divided, and enter on extreme parts of

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the lot, each upon his own portion, it will be considered, that they intend a division by a line drawn through the centre, leaving the two parts as nearly similar, as they can be and be equal. These propositions in relation to conveyances have been considered, as settled, for many years. In Orleans county, on the last circuit, it was decided, that the levy of an execution upon a specified number of acres, "off of the east end" of a lot, the lot being in a rectangular form, was a sufficient description by metes and bounds. And in the present case, the parties owning equal parts of the lot, and having evinced an acquiescence in a similar divisional line, drawn from one apex of the triangle, it must of course be drawn to such point in the opposite side, as will divide the land equally.

The question whether the defendants had such a previous possession of the land in dispute, as will prevent their being sued as trespassers, does not seem very different from the main question in the case. If the defendants had possession of the land first, and had equal right to the land, they should, and under the charge of the court, would have recovered. If they went into possession without right, and as mere trespassers upon the plaintiff's rights, he having a superior right to the land, he might well put the defendants out of such wrongful possession, and if he did it by force even, he would acquire a rightful possession, and would, at most, only be liable for a breach of the peace, or a trespass upon the person of defendants. It was formerly considered that the proprietor of land, who found an intruder in quiet possession of the same, must resort to his legal remedy, and could not forcibly expel such wrong doer. But it is now well settled, that such intruder may be forcibly expelled, so far as the land is concerned. If the owner of the land is guilty of a breach of the peace, and trespass upon the person of the intruder, in so doing, he is liable for that, but his possession of the land is lawful, and he may maintain it, or sustain any proper action for an infringement of it.

The declarations of Boothe, while in possession of the land, whether as tenant or proprietor, were correctly admitted. It was material for the jury to determine whether any divisional line had been acquiesced in. Boothe had been in possession of the portion claimed by Buckminster, and in the chain of occupants, under whom Buckminster claimed, and, while so in possession, had disclaimed all pretension to hold or occupy the land in

dispute, by pointing out a different line. It does not appear that he had been in possession for fifteen years, but he and others had been in continued possession of the portion of the lot, claimed by Buckminster, for more than fifteen years, and the line claimed by them was important to be ascertained. This could only be done by knowing what claims or declarations, in regard to the line, they had made while in possession. These claims or declarations were the *facts* for the jury to find. Their force did not depend upon the *veracity* of the person, who made them; for whether Boothe had been false or fair spoken, was all the same. The question was, did he make the declarations, or, in other words, was a line acquiesced in by both the claimants, giving the land in dispute, to plaintiff—and this for more than fifteen years? If so, that line became conclusively established. That can only be determined by knowing what claims the several occupants made, while in possession of the land. This is much like the case of an agent, who goes to another for the purpose of making a demand or giving notice. The declarations of the agent, at the time and place, and to the opposite party, are the *facts* to be found. The agent may be called or not, at the option of the party. If called, the party is not bound by his testimony. If he denies making the demand or giving the notice, other witnesses may be called, or they may be called in the first instance. So, had Boothe been called, and denied making these declarations, the plaintiff might still have shown by other witnesses, that he did, in fact, make them.

Judgment affirmed.

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ERASTUS WOODWARD v. GATES & CHENEY.

Where *W.* sold personal property to *J.*, and took notes, and a mortgage, to secure the payment of the sums, but the property was immediately put into the possession of *J.*, who continued in the use and possession thereof: *Held*, that the mortgage was void as against the creditors of *J.*

Where such mortgage was executed in New Hampshire, the mortgage residing in this State: *Held*, that the law of New Hampshire did not make valid such mortgage in this State; as the mortgage was not, and could not be recorded in this State, in pursuance of the laws of New Hampshire.

This was an action of trover for a horse. Plea not guilty. On the trial of said issue by the jury, it was conceded that, on the 24th day of March, 1835, the plaintiff owned said horse. The plaintiff then offered to give evidence, tending to prove that he resided at Jefferson, in the State of New Hampshire that John Jewell of Lunenburg, in said county of Essex, called on the plaintiff, at Whitefield, in New Hampshire, and contracted with him for said horse, together with three others, and some other personal property, consisting of a wagon, sled, and four harnesses, and executed therefor his note to the plaintiff, and a mortgage of the same property, conditioned to be void on the payment of the purchase money. To the admission of said mortgage the defendants objected, but the same was admitted by the court. At the execution and delivery of said note and mortgage, the said horses and other property were delivered to Jewell, who took the same to Lunenburg, where he resided until the same were attached, as herein after stated. Plaintiff procured said mortgage to be recorded, on the 6th day of April, 1835, under a law of New Hampshire, which provides "that no mortgage of personal property shall be valid, against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the said mortgage be recorded in the office of the clerk of the town, where the mortgagor shall reside, at the time of making the same."

The defendants gave evidence, tending to shew that, on the 8th day of April, 1835, said horses, being in the possession of said Jewell, and at said Lunenburg, were attached by said Gates, on a writ in favor of said Cheney, against said Jewell, said Gates being constable of Lunenburg, who delivered said horses to said Cheney, for safe keeping. Said writ of attachment was

duly returned to the justice of the peace to whom it was returnable, and afterwards prosecuted to judgment against said Jewell. The plaintiff produced testimony to shew that, after said attachment, and before said judgment, and before the service of the plaintiff's writ in this suit, and while the horse was in the possession of Cheney, the plaintiff demanded the horse of Cheney, who refused to deliver him.

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The court instructed the jury, that, if the testimony on the part of the plaintiff was by them believed, the plaintiff was entitled to recover. To all which the defendants excepted, and the case passed to this court for revision.

E. Paddock, and Heywood, for defendants.

In giving effect to contracts, it is important to look to the intention of the parties. In the sale of the property from Woodward to Jewell, it is evident that it was the intention of the parties to make an absolute sale to Jewell, and to take security back upon the property, under the mortgage law of New Hampshire. This is shown by the note given by Jewell to Woodward, the change of possession of the property, and the language of the deed from Jewell to Woodward.

But the property was not mortgaged in such a manner as to hold under the New Hampshire statute, which requires the mortgage to be recorded in the office of the clerk of the town, where the mortgagor shall reside, at the time of making the same. This was not complied with. The mortgage was recorded in Jefferson, the place where the mortgagee lived. This record could be no notice to the creditors of Jewell. The act was intended for cases only where the mortgagor is an inhabitant of New Hampshire.

If the object of Woodward and Jewell was not carried into effect, in the manner they intended, will the court give to the transaction an effect that they did not intend, and call this a *conditional sale*? Jewell gave his note for the property, which Woodward could at any time sue and collect. There was no condition, by which Jewell could compel Woodward to take the property back in discharge of the note. The property was at the risk of Jewell. If the whole had been accidentally destroyed, he must still pay the note. Nor could it have been attached as the property of Woodward. If this was a conditional sale, when would it become absolute? Upon payment of half the note? Or would it remain conditional till the payment

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of the whole? The Massachusetts cases, upon the subject of conditional sales, differ very much from this. In those cases, there was no note given, and the contracts were conditional, in express terms. *Whitewell et al. v. Vincent*, 4 Pick. Rep. 449.

Smith v. Dennie, 5 id. 262.

To sustain this case in favor of Woodward, would open a new door to fraud. Property can in this way be easily covered by fraudulent mortgages. It would go far to prostrate the salutary principles, so long practised upon by our courts, in relation to sales fraudulent in law.

S. Cushman and J. Steele, for plaintiff.

I. A contract, valid by the law of the place where it is made, is valid every where, *jure gentium*. 2 Kent's Com. 364, Story's conflict of laws, 201, 217, 219. *Pearsall v. Dwight*, 2 Mass. Rep. 88. *Dyer v. Hunt*, 5 N. H. Rep. 401.

The *lex loci contractus*, where it creates a lien on personal property, is to govern. Story's Conflict of Laws, 268. Id. 335.

The law of New Hampshire requires that the mortgage shall be recorded in the office of the clerk of the town where the mortgagor shall *reside at the time of making the same*.

In this case, Jewell, the mortgagor, resided in Lunenburg, Vermont—he had no residence at the time in New Hampshire. Where, then, should the mortgage have been recorded? In order to solve the question, the object of the legislature of New-Hampshire, in passing the act, must be considered, and that must have been,

1. To enable creditors to secure their just debts; and
2. To give such publicity to mortgages of personal property, as will prevent other creditors from incurring unnecessary cost.

If the creditors of Jewell, in New Hampshire, were in search of a mortgage on the property in question, where would they make inquiry?

The object the *parties* had in view, would be clearly accomplished by pronouncing the mortgage valid; and their intention is to be carried into effect, if consistently practicable. Story's Conflict of laws, 270. Id. 232.

There was no *fraud* on creditors.

II. By the civil law, the property remains in the vendor until *payment*, even although the vendee has the possession. 2 Kent's Com. 392. And where a condition is to be performed, if the vendee has possession, he will be considered as a trustee

for the owner or vendor. 2 Id. 391. *Ward v. Shaw*, 7 Wendell's Rep. 404.

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III. Whether the mortgage is valid, as a mortgage or not, it is valid as a bill of sale, and operates as a conveyance of the property—the note was payable on demand, the mortgage was broken, *eo instanti*, and the property was absolutely in the plaintiff. Jewell was liable to be dispossessed at any moment.

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He had no other interest in the horse, than that of a borrower.

The mortgage, bill of sale or agreement, and the note, were executed at the same time, and were all parts and parcel of the same transaction.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The sale of the property in question, by the plaintiff to Jewell, appears to have been perfected. A note was executed for the purchase money and a mortgage of the same property, to secure the payment. In this mortgage it is recited that the property was bought by Jewell of the plaintiff, and Jewell covenanted that he was the owner. The contract between the parties cannot be treated as a sale by the plaintiff to Jewell, not to be perfected or completed until the performance of the condition. The title of the plaintiff accrued by the mortgage executed to him by Jewell, on the 24th of March, 1835, and is not aided or strengthened by his previous ownership. As Jewell continued in possession of the property sold, from the date of that mortgage until the time it was taken in Lunenburg, by virtue of an attachment at the suit of Cheney, one of the present defendants, against Jewell, the sale or mortgage is inoperative as against the creditors of Jewell, however valid it may be between the parties. We have not, in this state, departed from the doctrine of the common law on the subject, but have uniformly adhered to the principle, that a sale of personal property, unaccompanied by a change of possession, is inoperative and void, as against the creditors of the vendor; and this principle has been considered as applicable to mortgages of personal property, where the mortgagor purchased the property of the mortgagee, and, at the same time, executed a mortgage of the same, to secure the purchase money. The case of *Tobias v. Francis*, 3 Vt. Rep. 425, is very similar to the case under consideration, and, indeed, is decisive of the question. If there should be any exception to the general rule, it was required in

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that case much more than in this. The only question remaining is, whether the statute of New Hampshire, which is made a part of the case, protects the property of the plaintiff against the attachment made by the defendants. If the statute had been complied with, my individual opinion is, that it could not have availed the plaintiff. The property, when in this State, was subject to attachment at the suit of the creditors of the vendor, so long as his possession remained unchanged. But the statute itself was not complied with. There was no record of the mortgage in the office of the clerk of the town where the mortgagor resided, which was in Lunenburg, in this State. The statute of that State can only apply to contracts in that State, the mortgagor residing there. The legislature of that State can make no provision to give effect to a record in this State not required by our laws. The statute was not complied with, and the plaintiff can derive no benefit in this case from its provisions. The result is, that the horse in question was liable to be taken by the defendants, as the property of Jewell, and their title is better than the plaintiff's.

The judgment of the county court must therefore be reversed.

ORLEANS COUNTY.

MARCH TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " STEPHEN ROYCE. } *Assistant Justices.*
 " ISAAC F. REDFIELD. }

PERLY AYER v. THOMAS JAMESON.

Orleans,
 March
 1837.

The lien, created by attachment of personal property, is preserved by giving —————
 the execution, within thirty days, to the officer attaching. |

When the attachment is made by one officer, and the execution is delivered to another, with directions to levy on the property attached, it is the duty of the officer, who has the execution, to demand the property of the one making the attachment.

An attachment, made by the sheriff's deputy, is the same as if made by him, and the lien is preserved by delivering the execution to the sheriff.

This was an action on the case against the defendant, as sheriff of Orleans county, for neglect of duty in not keeping property, attached by his deputy, John W. Mason, at the suit of the plaintiff against one Rogers, or in not pursuing such a course, as to preserve the lien acquired by the attachment. Plea—general issue, and trial by jury.

The plaintiff gave in evidence the attachment, at his suit, of Rogers' personal property, by Mason, as deputy of defendant—

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and the record of the proceedings and judgment, in said suit against Rogers. He also proved, that within thirty days after the recovery of said judgment, he prayed out execution against Rogers and caused the same to be delivered to the defendant; and that defendant returned the same, with a return of *nulla bona* and *non est inventus*, indorsed thereon.

The plaintiff, also, introduced evidence tending to show, that defendant had actual notice, while the suit against Rogers was pending in court, of the attachment made by Mason, and that the person, who receipted the property, had left the country, and taken the property with him—and further tending to show, that when defendant received the execution, he inquired of the clerk of the court, (who delivered the execution to him,) what the plaintiff would have done with it? and that the clerk replied, he supposed the object was to hold the property attached.

It appeared from the testimony of James A. Paddock, Esq. who was attorney of the plaintiff, as well in this suit, as that against Rogers, that shortly before the return of the execution, defendant called on witness at Craftsbury, and inquired, what he should do with the execution? and that witness replied, he supposed it must be *non-ested*. At the same time, he requested defendant to have the execution sent to him, Paddock, after it should be *non-ested*. The witness said the object of this request was to enable himself to institute a suit for the loss of said property, and that he believed the object was declared to the defendant.

There was no other evidence of any direction to defendant, to pursue the property attached, or to take any other course with the execution. The defendant contended, and requested the court to charge the jury, that, upon this evidence, the plaintiff was not entitled to recover. But the court charged the jury, that the evidence was sufficient, if believed, to fix the defendant with the duty of pursuing such a course with the execution, as would secure to the plaintiff the benefit of the original attachment; and that whether he was afterwards discharged from that duty, by what passed between him and the attorney, would depend on the construction to be put on that conversation. If it was to be understood as a direction and control of the execution, then assumed by Paddock,—defendant was excused, and ought to have a verdict—but if it did not amount to such a direction, or control, plaintiff was entitled to recover—and as they believed

said conversation should be understood, so their verdict would be made up. Verdict and judgment for plaintiff—and exceptions by defendant to the said charge of the county court.

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A. Young & J. Cooper, Jr. for defendant.

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The principle question doubtless is, whether Jameson, the defendant, has in his official capacity done, or left undone, any thing in the premises, whereby he becomes legally liable to the plaintiff. In order to charge the defendant, he must have neglected some known duty—at least, such as he was legally bound to know,—or to have done some act contrary to his general duties, or to some special instruction, whereby the plaintiff was damaged.

Had the defendant served the original writ, his receiving the execution, as proved, would have been a legal taking of the property by him, agreeably to the construction given to the 33 Sec. of the Judiciary act. Or had the defendant received the execution in proper season, with suitable and explicit instructions to call on Mason, who made the original attachment, and demand of him the property, he would have been liable, had he failed to perform what would then have been his duty.

But time and a knowledge of such facts, as would enable him to obey the plaintiff's instructions, are necessary in order to charge defendant for a non-feasance.

Nor should such knowledge be made to rest upon a casual or incidental conversation, that might have taken place at some distant period of time, when it was not known whether the story related would be of any consequence, or importance, whether true or false—as must have been the case in the present instance, if the defendant ever had any knowledge whatever on the subject.

But in the absence of any reason shown, why the execution was not delivered to Mason instead of Jameson—it appears that any information, which Jameson received, or possessed, on the subject, must have been extremely vague, indefinite and unintelligible; and not such as he was legally bound to remember or notice, or such as the law would require in order to charge him. Besides, if he was to draw any conclusion from appearances, they certainly served to show, that the execution was then handed to him for the sole purpose of holding bail.

The case states, that evidence was given by plaintiff, tending to show, that during the pendency of the suit against Rogers,

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defendant had actual notice of the attachment made by Mason, and that the person, who receipted the property, had taken it out of the country.

But how, or by whom, this actual notice was given, does not appear, or whether the notice was true in point of fact, otherwise than that it appears by the return on the original writ, that the attachment was made by Mason. Nor does it appear that Jameson was informed how much, or what kind of property, was attached,—or that he believed, or took any notice of the report that whoever might have receipted the property had taken it out of the country, or that he heard who the receiptor was, or whether responsible or not—or whether the property might not be in readiness when required; nor would Jameson be likely to trouble himself at all on those points, or even to notice them or remember them, if he supposed his deputies capable of taking care of themselves.

Nor does it appear but that the property attached was, from the rendition of the judgment until thirty days thereafter, in the legal possession of Mason by himself or another, ready to be delivered or taken on the execution, according to all legal presumption.

As to the inquiry made by Jameson, of the clerk, on receiving the execution, if it implies any thing, it implies an ignorance in Jameson of the whole matter till then—and a desire to ascertain the plaintiff's wishes in the matter. But the reply of the clerk gave him no specific directions, or information, in the matter—but merely a supposed object.

J. F. Redfield, for plaintiff.

The opinion of the court was delivered by

WILLIAMS, Ch. J. We think, from the case as presented, that the defendant was rightly held accountable to the plaintiff.

When the goods and chattels of a debtor are attached, and a judgment is rendered against the debtor, the lien is preserved, if the creditor deliver the execution to the officer, who made the attachment, within 30 days from the date of the judgment. The articles attached are considered in the custody of the attaching officer, and it is his duty to levy the execution thereon, unless directed to the contrary. Where the attachment is made by one officer, as by a constable, and the execution is delivered to another, as a sheriff, the plaintiff should direct the officer to levy on the property attached, and it would then become the

duty of the one who had the execution, to demand of the one who made the attachment, the property so attached.

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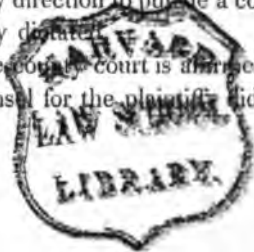
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In the case before us, the attachment was made by the defendant's deputy, Mason, and, in contemplation of law, was made by the defendant himself; the property attached was in his custody; and the plaintiff preserved his lien by the delivery of the execution to the defendant within thirty days. The neglect of the defendant to levy on the same, was a neglect of his duty, according to the doctrine of the case of *Bliss v. Stevens*, 4 Vt. Rep. 88.

But, moreover, the defendant was apprized that the attachment had been made by Mason, the deputy sheriff. When he received the execution, he was reminded by the clerk of the court, who delivered it to him, that the object of the plaintiff was to hold the property attached. If the attachment had been made by a different officer, the duty of the defendant, under these circumstances, was to levy on the goods attached, or take such course as would secure to the creditor the benefit of the attachment. On either of the grounds the defendant was liable, unless he was discharged from his liability in consequence of the directions of Mr. Paddock, the plaintiff's attorney. And upon this question, it is sufficient to remark, that the subject was left to the jury, under a charge quite as favorable as the defendant could ask. We cannot see that Mr. Paddock exercised any control, or gave the defendant any direction to pursue a course different from the one which his duty dictated.

The judgment of the court is affirmed.

REDFIELD, J. being of the counsel for the plaintiff, did not sit in this case.



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IRA RICHARDSON v. LEONARD BRIGHT.

— If an infant receive a deed of land, and execute a mortgage to secure the purchase money, he cannot avoid the mortgage and affirm the deed.

Every contract of an infant, merely voidable, will bind him, after becoming of full age, unless he disaffirm it, within a reasonable time after becoming of age.

How far misrepresentation, as to the title of the land, will affect the contract, where the conveyance is by quit claim deed.

This was an action of assumpsit on note, dated January 22d, 1828. Plea general issue, and trial by jury. On the trial, the defendant proved that, at the time of executing said note, he was a minor, having been born March 5th, 1809; and also that the note in question, and several others, to the amount of three hundred dollars, were given by the defendant in part payment of a house and lot of land; that said house and lot were deeded to the defendant by Augustus Richardson, a brother of the plaintiff, the title to the house and lot being in the said Augustus; which deed was executed at the request of the plaintiff, who was the real owner of the land. And also, at the time of said purchase, the defendant executed a mortgage of said house and lot to said Ira, to secure the payment of said notes. And it was further proved that the defendant, in March, 1829, being yet a minor, quit-claimed said house and lot to a third person, and removed from the premises. And the defendant also offered to prove, as evidence of a failure of consideration for said note, and of fraud on the part of the plaintiff in the sale of the house and lot, that, at the time of making the purchase, the plaintiff represented to the defendant that the premises were not incumbered, and induced the plaintiff to accept of a deed of quit-claim of the same; That the said house and lot were incumbered by mortgage to the amount of about eighty dollars, at the time of his purchase; which fact had been denied by the plaintiff: That after the defendant had made several payments for the house, he discovered the mortgage, and soon after quit-claimed the house and lot to a third person, for much less than he had actually paid the plaintiff, and abandoned the possession. Which testimony was objected to by the plaintiff, and rejected by the court. The court further decided that, inasmuch as the defendant had not, within a reasonable time after he had arrived at full age, disaffirmed the contract with

the plaintiff, he, the defendant, was concluded and barred from any advantages he might claim from his plea of *infancy*, and directed a verdict for the plaintiff. To which several decisions of the court the defendant excepted.

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S. Sumner, for defendant.

Contracts of infants are considered as binding, void, or voidable. Binding, when for necessities; void, when to their prejudice; voidable, when for things of an uncertain nature, as to benefit or prejudice, and are at the election of the infant to affirm or not, when of age. 2 Dane's Ab. 25. 2 H. Blac. Rep. 511. Under which head of void, voidable, or binding, is this case to be considered? Certainly not of the class of binding contracts, for it most surely was not necessary for the defendant to purchase houses and lands.

Is the contract void? It evidently appears to have been to the prejudice of the defendant, and deceptive and fraudulent on the part of the plaintiff.

If the contract is to be considered voidable, it then remains at the election of the infant to affirm it or not.

We insist that, as the defendant did not affirm it when he became of age, the contract is null. And further, that the facts proved in the case imply a disaffirmance on the part of the defendant. What is meant by an election, and how is it to be manifested? And what amounts to an affirmance? The case shows that the defendant, before he came of age, finding himself overreached and defrauded, and unable or unwilling to meet the payments for his house and lot, together with the previous incumbrance, disposed of his interest in the land, and abandoned the possession, and it does not appear that he has since taken any interest or concern in the transaction. From these acts it would seem to be clear enough that the election of the defendant, which the law allows him to make, was to abandon the contract. We would ask further, what could the defendant do when he became of age, and what the law would require him to do, to disaffirm this contract? Should he go to the plaintiff and offer to redeed and to give up the possession of the land he had purchased? He had already redeeded to another. Should the defendant go to his grantee, disaffirm his contract with him, turn him out of possession, then go to the plaintiff and disaffirm with him also? This would be an unwieldy shield for an infant to use. The boasted protection, afforded by the law to infants, is

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but a poor defence, if it would require the defendant to go through all these manœuvres to get rid of the difficulties, in which the fraud of the plaintiff and his own inexperience had involved him. The defendant took a more natural course, and one, it would seem, sufficiently intelligible, to manifest the election or choice which he had made. He abandoned the whole concern or contract.

We find it decided that infants may avoid their contracts, unless affirmed by *acts* or *words*, after they arrive at the age of twenty one. 4 Vt. Rep. 154.

Some *positive act* or *declaration*, on the part of the infant, is necessary to defeat his power of avoiding his contract. 1 Swift's Dig. 59.

If a promise is made when of age, the promise must be direct, and proved by such evidence as would prove a new contract. 2 Dane's Ab. 31.

An infant's deed, if when of age he does any *act* to confirm it, is made valid. 4 id. 441.

His continuance in possession, after full age, of lands demised to him during his minority, is an affirmation of the lease. 2 Starkie, 725.

And if an infant mortgagor, after becoming of age, convey the same land to another, subject to the mortgage, which he recognizes in the deed, he thereby confirms the mortgage. 2 Starkie, 725, Note.

Security, given by an infant, may be revived by a promise, after he comes of age. 2 T. R. 766.

A direct promise, when of age, is necessary to establish a contract made during minority, and a mere acknowledgment, as in cases under the statute of limitations, will not have that effect. Such promise must be made deliberately, and with a knowledge that the party is not liable by law. 9 Mass. Rep. 62. In this case we find none of these acts of confirmation;—no direct, deliberate promise—no acknowledgment by deed after the defendant became of age—no benefit derived—no act, of any kind, to adopt or recognize the acts of his minority, but a disposition to avoid the whole;—the possession abandoned and conveyance made before he became of full age—the whole transaction begun in infancy and ended in infancy.

J. Cooper, Jr. for plaintiff.

I. The conveyance by the defendant of the premises having never been disaffirmed by him, and the deed from Augustus

Richardson to defendant and his mortgage back being one entire contract, and no notice of the disaffirmance having ever been given, the defendant is to be deemed to have affirmed them. 1 Swift's Dig. 58. 1 Kent's Com. 195. 6 Conn. Rep. 502. 8 Taunt. Rep. 35. *Bigelow v. Kinney*, 3 Vt. Rep. 353.

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II. The lapse of time, since defendant became of full age, without notice of disaffirmance, binds him.

III. Partial failure of consideration does not avoid a note or other contract—nor even a total failure, in the absence of fraud. 2 Stark. Ev. 280. *Bowers v. Hurd*, 10 Mass. Rep. 427.

When a promissory note is given for the purchase of real estate, and the title of the estate fails, it is not a good defence against the note unless the failure be total. *Greenleaf v. Cook*, 2 Wheaton's Rep. 13. *Smith v. Sinclair*, 15 Mass. Rep. 171. *Loyd v. Jewel, et al.* 1 Greenleaf's Rep. 353. 11 Johns. Rep. 50. 2 Stark. Ev. 270. 2 H. Black. Rep. 273. *Moggridge v. Jones*, 14 East's Rep. 480.

IV. The defendant, by an examination of the records in the town clerk's office, might have ascertained whether the estate was encumbered or not, and having the means of knowledge, it was his own fault that he did not avail himself of such means. 2 Stark. Ev. 270. *Vernon v. Keys*, 12 East's Rep. 652. 4 Taunton's Rep. 488. *Emerson v. Brigham et al.* 10 Mass. Rep. 197. 2 Ld. Raymond's Rep. 1118. Buller's N. P. 31, 32. 2 Stark. Ev. 471.

The opinion of the court was delivered by

REDFIELD, J. The question here, in regard to the infancy of defendant, is so much the same with that decided in the case of *Bigelow v. Kinney*, 3 Vt. Rep. 353, as hardly to admit of any distinction. It was there held that the infant could not avoid the mortgage, and affirm the deed, but the entire contract must stand or fall together. And it was further decided, that if the defendant would avoid the contract, on the ground of infancy, it was incumbent upon him to give notice of such disaffirmance within some reasonable time after coming of full age, or he would be considered as having ratified it. The same doctrine is held in the cases of *Holmes v. Blogg*, 8 Taunton, 35. And *Kline v. Beebe*, 6 Conn. Rep. 494. Indeed it is but the long established doctrine of the common law. In the case of every act of an infant, which is merely voidable, he must disaffirm it, on com-

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ing of full age, or he will be bound by it, and this must be done in a reasonable time. It is not contended that the defendant did this. The charge of the court below to the jury was correct, then, upon this point.

In regard to the offer of the defendant to show such a fraud on the part of plaintiff, as to avoid the contract, we think the court below decided correctly. It did not amount to a total failure of consideration, so as to exonerate defendant from his promise. There were no covenants on the part of plaintiff, whereby the loss could be made the subject of a plea in off-set.

The incumbrance, offered to be shown, was a pre-existing mortgage, which must have been upon record, or it could not affect the defendant, unless he had notice, at the time of the conveyance, in which case he could not now complain. If the deed were upon record, it would be constructive notice to defendant, as well as plaintiff, and it does not appear either of them had notice, in fact. And if the plaintiff had notice, in fact, of the incumbrance, which was upon record, and used no means to prevent the knowledge coming to defendant, he would be guilty of no legal fraud in selling and deeding to defendant, without notifying him of the incumbrance. But the case does not show that plaintiff had such notice.

The judgment of the county court is affirmed.

EBENEZER BROUGHTON, Jr. v. JOHN FULLER and WILLIAM FULLER, Jr.

Orleans,
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1837.

In all actions *ex contractu*, the plaintiff, under the statute of 1835, may recover against one or more defendants, and the other defendants recover their costs, whether the suit be upon a contract in writing or not.

If a promissory note be altered in a material point, by consent of one signer, without the consent of the other signer, it is the note of the first, but not of the other, and, if declared upon as the joint note of both, the plaintiff may recover against one, and the other recover his costs.

Difference, stated as to the materiality of time, in declaring upon written contracts, between "the date" and the time of execution.

This was an action of assumpsit on a joint note given by defendants, for fifty dollars and interest, dated September 17, 1832, and made payable one year from January, next after the date.

On the trial of the issue, defendants gave evidence, tending to prove, that said note was given—not to the plaintiff—but to one Ebenezer Broughton, and that the said Ebenezer Broughton died at Fort Anne, in the State of New York, before the commencement of this action.

The plaintiff then offered evidence, tending to prove, that defendant, William Fuller, Jr, in March, 1833, consented to the said Ebenezer Broughton's making said note payable to the plaintiff, by inserting the word *Junior*, in the body of the note; which evidence was objected to by the defendants, but admitted by the court.

Whereupon, the cause being submitted, the court charged the jury, that, if they found that said alteration was made in the presence of the said Wm. Fuller, Junior,—and if his consent thereto was fully proved, they were at liberty to return a verdict against him, and in favor of the other defendant, which they accordingly did, and judgment was thereupon rendered, in favor of the plaintiff, against said William Fuller, Jr. and in favor of the other defendant against the plaintiff.

To the decision of the court, admitting evidence as aforesaid, and to the charge, and judgment, William Fuller, Junior, excepted.

J. H. Kimball, for defendants.

I. This being an action on a joint note, there must be a recovery against both the defendants, or neither.

II. The adding *Junior* to the name of the payee of the note, changed the person of the payer, so that it no longer re-

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mained the same note. It was a material alteration, and rendered the note invalid. 2 Starkie Ev. 395 and note 1. 1 Selwyn, 334.

III. The evidence for the plaintiff tended to prove a note made, executed and delivered, in March, 1833, by one of the defendants.

The plaintiff, in his declaration, sets forth a joint note, "made, executed and delivered, in September, 1832," and the note in evidence corresponds with the description in his declaration.

This evidence was inadmissible,

1. Because a note takes effect from its delivery, and not from its date—and being made a new note by the alteration, it could not be delivered before March, 1833. *Woodford et ux. v. Dorwin*, 3 Vt. Rep. 82.

2. Because plaintiff's evidence proves a contract not set forth in his declaration—and unless the description in the declaration correspond with the evidence, the variance is fatal. 2 Phil. Ev. 1, and note *a*. Chitty on Bills, 531. 1 Selwyn, 117.

IV. The note is absolute on the face of it, and the general rule applies—that "parol evidence is inadmissible, to contradict, vary or explain a written contract, or to show it *different* from what it purports to be on the *face of it*," or "to vary the promise." *Bradley v. Anderson*, 5 Vt. Rep. 152. *Farnham v. Ingham et al.* id. 514.

V. The statute of 1835, (p. 7,) does not contravene these principles.

It is there enacted, that in any action, founded on contract, any of the defendants, not a party to such contract, shall be discharged, and that the plaintiff shall, thereupon, be entitled to recover against the other defendants in such action, in the same manner, *as* if such action *had originally* been brought against such *other* defendants *only*. The object of this statute, manifestly, is to save the rights of the plaintiff in cases where he might have maintained his original action, against a less number of defendants than the number sued, had he *originally* sued them *only*. Therefore, the plaintiff can take no benefit from this statute, unless he could *originally* have maintained his action against Wm. Fuller, Jr. *only*—and had he done so, the above named rule, restraining parol evidence, would have excluded the

testimony. This construction restrains the statute to its proper use, and saves the principles of the common law.

J. Cooper, Jun. for plaintiff.

Does this case come within the provision of the statute of 1835? To answer this question, we have only to look at the note, as the several note of Wm. Fuller, Jr. If the note had been given by him alone, and the alteration had been made afterwards, by his consent, would it, or would it not have been a new contract, from the alteration? If it is not a new contract, then, most clearly, John Fuller is liable on the original note. But no one will pretend this, as it would be repugnant to every principle of law, to say, that he should be indebted to the plaintiff without his own assent, either express or implied. Then, if the obligation is altered so far as to affect the note as to John Fuller, surely it becomes a new contract as to William Fuller, when we prove his assent to the alteration. If so, it comes strictly within the statute provision.

The opinion of the court was delivered by

REDFIELD, J.—At common law, the plaintiff, in an action *ex contractu*, must make his case against all the defendants sued, or he could not recover against any. But, by a recent statute of this State, the plaintiff, even in actions *ex contractu*, may recover against any number of defendants, less than the whole number, and the others, recover their costs. So that, now, the joining too many defendants, is no ground of abatement even, much less of non-suit or error. And by the same statute, if too few defendants be joined, the others may be cited. This is engraving on the system of law a principle of the proceedings in chancery, which may be found to work well in practice, or it may be found too cumbersome and complex, to consist with the machinery of special pleading, and trial by jury. This statute has been long enough in force to determine its utility. Whenever any part of our proceedings in courts are found manifestly defective, it is the part of sound policy to reform them; but when they have been long established, and operate in any tolerable degree, it is sometimes better to "bear the ills we have, than fly to others that we know not of."

It is contended that this case, being a suit upon a written contract, is not within the purview of the statute. And the distinction is put upon the ground, that here is a variance between the declaration and the proof. But this is always the case, where the

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proof shows the contract made by a less, or a greater number, than the declaration, and it is upon this ground, that, at common law, the plaintiff could not recover; and it is to cure this variance the statute was enacted.

The other points in the case seem to resolve themselves into much the same principles with those already adverted to. It is true, that the insertion of the word "Junior," without the consent of the signers, would avoid the note, but if made by their consent, it would be virtually making a new note, and antedating it. If made by the consent of one, it would be binding upon him, but not upon the other. The date of the note not being altered is not material. A note made one day may be dated another, and this is well enough, unless it is done to cover usury. In declaring upon a note without date, time is no more material than it is in a declaration upon a merely verbal contract. And when the note is dated, time is not material, except as a part of the description of the note. If the declaration state the note was *executed* on a certain day, different from that, on which the note bore date, there is no fatal variance; but if the declaration allege that the *date* of the note was different, from what in point of fact it was, the variance is fatal, for the date is part of the description of the note. Hence, although the note now in suit is not the note of one defendant, and, as the note of the other defendant, was executed at the time of the alteration, (but the date remained the same,) and although the plaintiff might truly allege the time of execution, yet, if the date be set forth, it must be truly described. So the plaintiff has done.

The judgment of the county court is, therefore, affirmed.

LAMOILLE COUNTY.

APRIL TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " SAMUEL S. PHELPS. } *Assistant Justices.*
 " ISAAC F. REDFIELD. }

Lamoille,
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JOHN B. DOWNER v. ZELA RICHARDSON.

If one sell the betterments on a lot of land to another, and it is agreed by both parties, that the title is in a third person, and the vendee is to run the hazard of procuring that title, he may take a deed of such third person at any time, and hold the land against the vendor of the betterments, even although he have not paid the vendor the price of such betterments.

If the vendor, in such case, is employed to negotiate with the owner of the land for procuring the title, if he is bound to convey immediately to the vendee, his power is revocable and the vendee may take a conveyance of the owner of the land, without the vendor's consent, and hold the land against him, even before he has paid the price of the betterments.

In the case of vendor and vendee of real estate, no right of recovery in ejectment for the lands exists in favor of the former against the latter, unless the vendee fails to perform the contract on his part, and, especially, where the vendor is the occasion of the contract not being carried into full effect, or where he has put it out of his power to perform the stipulations on his part.

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This was an action of ejectment for lots No. 43 and 44, in the town of Stow. The general issue was pleaded.

The plaintiff proved the defendant in possession of the land, described in his declaration, at the time of the service of the writ.

Plaintiff also gave in evidence a copy of a deed of the same land, from Sessions and Kellogg to the defendant, dated 27th of February, 1834, duly acknowledged and recorded.

Also, a copy of a deed of the same land from Ozias Gallup to said Sessions and Kellogg, dated 9th December, 1833, duly acknowledged and recorded.

The plaintiff, also, introduced testimony, tending to show that in March, 1832, he, as agent for his father, Thomas B. Downer, made a contract with, and sold to said Ozias Gallup, the betterments on the land in question, for about three hundred dollars, that a bond or writing was given to Gallup, by which the said Thomas agreed to deed the land to Gallup, by quit-claim, on payment, by the latter, of certain notes, specified in said bond or writing, and that this writing had been since lost or destroyed. That it was understood at this time, between said John and Ozias, that the title to the land was in Horatio Seymour, and was to be derived from him to said Ozias; but the said John was to negotiate with Seymour for the benefit of said Ozias, and, as soon as he could get a deed from Seymour, to convey it to said Ozias. Said Ozias consented to this, as said John could better deal with Seymour than he could. Gallup went into possession of the premises under this contract. The plaintiff further gave in evidence a deed from Thomas B. Downer to himself of the same land, dated in January, 1834, duly acknowledged and recorded.

It was admitted the notes, above named, had never been paid, and the defendant, on being requested, refused to quit the premises, claiming to hold them in his own right, under Seymour.

The defendant gave testimony tending to show that, as early as the year 1826, Seymour claimed title to the premises;—that one Buzzell, about that time, went into possession under Seymour, and from that time various individuals occupied the premises under Seymour,—each predecessor selling and usually conveying the betterments to his immediate successor,—until one Stephen Atwood, who derived title from Luke Atwood, by deed, conveyed the premises to Thomas B. Downer;—that both Stephen and Luke Atwood acknowledged the title of Seymour.

The defendant also gave evidence tending to show that, on the 27th day of October, 1832, Ozias Gallup obtained a deed of the premises from Seymour. The defendant's testimony was objected to by plaintiff, but was admitted by the court.

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From this testimony, the court instructed the jury that the defendant would be entitled to recover his costs, if they believed the testimony.

Plaintiff excepted to the charge of the court.

P. Dillingham, Jr. and O. W. Butler, for plaintiff.

The plaintiff was entitled to recover, unless the defendant could protect himself by an outstanding title, at the time of plaintiff's putting Gallup into possession, and which he afterwards purchased in.

We insist that defendant should not have been permitted to give this title in evidence, and that, if admitted, it did not legally operate to defeat the plaintiff's claim to the premises.

I. Defendant, having derived his title through Gallup, is situated precisely as Gallup would be, were he defendant, and can set up no other defence, than he might have done, had he been sued before his conveyance of the premises. *Bowker v. Walker*, 1 Vt. Rep. 18. *Reed v. Shepley*, 6 Vt. Rep. 602.

One holding under another, who held under plaintiff, cannot dispute plaintiff's title. *Jackson v. Whitford*, 2 Caines' Rep. 215.

A succeeding tenant is as much affected by the acts and acknowledgments of his predecessor, as though they were his own. 5 Cowen's Rep. 123. 7 id. 323.

II. A person, who has entered into possession under another, and thereby acknowledged his title, cannot set up an outstanding title in a third person. *Jackson, ex dem. Smith, et al. v. Stewart*, 6 Johns. Rep. 34. *Jackson, ex dem. Davie v. Watts*, 7 id. 157, 186. and note, b.

Possession is sufficient to maintain ejectment against a stranger, and even he may not set up an *outstanding* title against the *disseizee*. *Hathaway v. Phelps*, 2 Aik. Rep. 84.

If the defendant, having originally entered under *A*, afterwards take a lease from *B*., he cannot, in an action of ejectment against him, by a person claiming under *A*., deny *A*'s title, and set up *B*'s title, as an older and better one. *Jackson, ex dem. Bowne v. Hinman*, 10 Johns. Rep. 292.

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III. All the principles, relating to landlord and tenant, apply to the parties in this case.

Where a person, in the possession of land, enters into a contract for the purchase of it, such act is a recognition of the vendor's title, and precludes the vendee from denying it. And, in case of a forfeiture, he is a mere tenant at will, not entitled to notice to quit; and, on failure to make payments according to the terms of the contract, an action of ejectment lies to recover the possession. *Whitside et al. v. Jackson*, 1 Wend. Rep. 418.

On making a contract to purchase land, and taking possession under it, though, strictly, the relation of landlord and tenant is not thus created, yet the vendee, in ejectment against him by the vendor, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. *Jackson, ex dem. Livingston v. Walker*, 7 Cowen's Rep. 637. *Jackson, ex dem. Norris, et al. v. Smith*, id. 717. *Hamilton v. Taylor*, Litt. select Cas. 444—5. *Jackson ex dem. Young & Devereux v. Camp*, 1 Cow. Rep. 610. *Bolls et al. v. Shield's Heirs*, 3 Littell's Rep. 34. 7 Cowen's Rep. 637.

In the present case, the improvement, or betterments, as they are called, had become vastly more valuable than the mere fee of the land, and, all along, passed by deed. Now, if the Seymour title was still outstanding, could Gallup or this defendant set it up to defeat the plaintiff? We think no one will pretend it. And if they could not, certainly, if there is any force in authorities, their condition cannot be bettered by having purchased it in.

It matters not that plaintiff and Gallup understood, at the time of this contract, that Seymour had, or claimed to have title to the land, which was to be derived to Gallup, because it was expressly agreed that Gallup was not to buy it in, but that *that* was to be done by Downer. There was good reason for this agreement. And now to permit the title purchased in by Gallup, contrary to express agreement, to be set up as a defence to plaintiff's right, would be to permit defendant to take advantage of his own wrong, which the law much abhors.

Had Gallup mortgaged to plaintiff, when he purchased, to secure the notes, could he have resisted that mortgage? If not, in what different relation does he now stand?

IV. When Gallup purchased in Seymour's title, it was merged in the claim of Downer, and enured to his benefit. 3 Johns. Rep. 499. 4 id. 211, 230. 4 Cowen's Rep. 587. 5 id. 130. 6 Vt. Rep. 607.

L. B. Peck, for defendant.

I. Both parties claiming title under Seymour, the defendant is entitled to judgment, he having the better right from the common source. *Brooks v. Chaplin*, 3 Vt. 281.

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II. *Gallup*, under whom the defendant claims, was not put into possession of the land in controversy, as the property of the plaintiff's grantor. The title at the time was admitted to be in Seymour. The plaintiff's grantor claimed no title to the land, but only an interest in the betterments, or improvements, and at the time of the contract, agreed to procure a deed from Seymour to *Gallup*. Under such circumstances, the principle, that the tenant cannot dispute the title of his landlord, does not apply, for here the plaintiff's grantor claimed no title. *Gallup*, in accordance with this contract, having obtained a deed from Seymour, and passed his title to the defendant, the plaintiff's equitable claim for it must give way to the legal title. *Blight's Lessee v. Rochester*, 7 Wheat. 335.

III. *Thomas B. Downer*, by the conveyance to plaintiff, put it out of his power to fulfill the contract, and it must be regarded on his part, as an abandonment of the contract. But admitting that the defendant would be estopped from setting up the Seymour deed in a suit by *Thomas B. Downer*, it does not follow that his grantee can take this ground.

The opinion of the court was delivered by

REDFIELD, J. The only question to be determined in this case is, whether the defendant is estopped from disputing plaintiff's title, by notice of the contract with *Thomas B. Downer*. We think that the doctrine of estoppel does not properly apply to this case, as between these parties.

It is first to be remembered, that *Thomas B. Downer* purchased his right of the acknowledged tenant of Seymour. He becomes, of course, the tenant of Seymour. He sold to *Gallup* all his right, i. e. the right of becoming Seymour's tenant, or *quasi* tenant, with the right of purchasing the title at its original price. He did not profess to retain any lien upon the land, and, from the very nature of the case, he could not retain any such lien or mortgage. The land was not his. He did not profess to sell it. He had no right to bargain it. He did not bind himself to procure Seymour's title, or that it could be procured at any given price, or indeed, at any price. Of all these *Gallup* was to run the hazard. *Downer* offered to negotiate with Sey-

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mour, and Gallup consented, but it does not appear that this formed any part of the principal contract. If Downer obtained the title of Seymour, he had no lien upon the deed for his own security, but was bound to convey immediately. Under these circumstances, it would be in vain to pretend that Gallup was not at liberty to purchase the title of Seymour. It was just what, of all things, he would have been expected to do. The authority, which he had conferred upon Downer, to negotiate with Seymour, was not obligatory upon Downer, and, of course, was revocable by Gallup, at any moment. By the contract, Gallup became Seymour's tenant, and Downer ceased to be such. Seymour might sell to Gallup or his grantee, but could not, with propriety, sell to any other.

It is to be observed too, that, in all contracts for the sale of real estate, or any interest therein, the vendor cannot put the vendee out of possession of the land, unless the vendee fails to perform the stipulations on his part, while the vendor is still ready and willing to perform on his part. Thus it is evident, that, although this relation has been denominated a species of tenancy, it has very little analogy to the relation of landlord and tenant, until the vendee fails, on his part, to perform the terms of the contract, when the vendor's right arises, and he may disregard the entire contract of sale, and the vendee becomes a tenant at will.

In the present case, the vendor, Thomas B. Downer, had, without the consent of Gallup or his grantor, conveyed to plaintiff all his right in the land, if any he ever had, and thus had, in one sense, put it out of his power to perform the contract on his part, if it is to be treated as a contract to convey an interest in land. This latter view was relied upon by one of my brethren, as confirming the general doctrine of the case. And if it needed confirmation, this would seem to be conclusive.

Judgment affirmed.

N. P. SAWYER v. JAMES NEWLAND.

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An entry upon land, under a deed, claiming title to the same, and cutting and selling timber from time to time, and exercising acts of ownership, is a sufficient possession to maintain an action of *trespass quare clausum fregit* against a stranger.

An imperfect division, evidenced by a plan, or by parol, acquiesced in by the proprietors, is good against a stranger.

A license to enter must be pleaded, or, if given in evidence under the general issue with notice, the plaintiff may recover for all the trespass not justified by the license.

Trespass, quare clausum fregit. The plaintiff declared against the defendant for entering, and cutting timber upon Lot, No. 26, in the third division of the original right of Jonathan Brewster, and Lot, No. 31, in the third division of the original right of Elihu Marvin—both in Hydepark. The trespass was alleged as of the 1st. day of May, 1828, with a *continuando* up to the 12th day of March, 1834. Plea—general issue, and trial, in the county court, by jury.

The plaintiff showed a deed to him from Matthew Franklin, dated 30th Oct. 1811, acknowledged the same day, conveying the right of Jonathan Brewster—also, a vendue deed from Veranus Lothrop, to plaintiff and John McDaniel, dated April 6, 1814, of the right of Elihu Marvin. These deeds were objected to by defendant, but admitted by the court, as showing color of title in plaintiff.

The plaintiff then offered certain records, as the records of the proprietors of Hydepark, which were objected to, but admitted by the court to be used, in connection with other testimony, to make out a division and draft,—also, a certified copy of the charter of Hydepark, containing the names of Jonathan Brewster and Elihu Marvin, which were admitted and read.

Plaintiff then offered a plan of Hydepark, which was not the original plan of the town, nor ever sanctioned by the proprietors, or the town, but which a former town clerk had procured to be copied from one in his office, which latter seemed to be equally unauthorized, except from the circumstances of its remaining in the office, and having been used by the inhabitants of the town for the purpose of examination and other ordinary purposes of a plan. It also appeared, that only a part of the

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plan, made by the surveyor, who allotted the town, was in existence, or had been, for a great number of years.

The plaintiff then offered testimony, to prove a division in fact, and proved that the lands in said town had been known by lots, lines and corners, for more than forty years ;—that the Marvin lot had been known by that name,—as, also, the Brewster lot, which had been considered a 200 acre lot—that the witnesses had frequently been on it, and that, for many years, it had been called the mill lot and Sawyer lot—indifferently ; and, in the opinion of the witnesses, was lot No. 26 ; that defendant and Jesse B. Noyes built a saw-mill upon one corner of it, in, or about, the year 1825 ;—that the lot was, previously, wild and unsettled, lying in a remote part of the town. All the testimony concurred in showing lot No. 26, in the third division, to belong to the right of Brewster, and No. 31, to the right of Marvin. Whereupon the court held the division and draft to be proved.

Plaintiff then offered a copy of a deed from himself to defendant,—having given notice to defendant to produce the original,—of three acres of land, to be taken from the third division of Jonathan Brewster, No. 26. This deed was objected to by defendant, but admitted by the court for the purposes of description. It was proved that the mill was erected on that part of the Brewster lot, conveyed by plaintiff to defendant and Jesse B. Noyes.

The plaintiff offered testimony tending to prove, that the defendant, previously to the first of May, 1828, had a license from him to enter upon lot No. 26, and take therefrom all the down or lying timber thereon, saw it into boards, rendering plaintiff a share of the produce, and that defendant did enter under said license, no particular limitation having been fixed to the license by the parties.

There was, also, testimony tending to prove that the defendant, within the time alleged in plaintiff's declaration, had cut standing pine trees on both lots, and other timber on the mill lot No. 26. The Marvin lot was proved to have been owned, at the commencement of this suit, jointly by plaintiff and John McDaniel, and that McDaniel died before the time of the trial.

It also appeared that plaintiff, in 1826, sold 50 acres of the Marvin lot to J. W. Smith—and had, at different times, given licenses to others to cut timber on both lots—lot No. 26 having been generally reputed to belong to plaintiff, and No. 31, to plaintiff and McDaniel.

The defendant requested the court to charge the jury that the plaintiff had failed to make out title to the lots in question—that he had not shown any prior seizin or possession, or any other title, which could enable him to recover in this action, and that it was incumbent upon the plaintiff to make out a title from the original proprietor, or a possessory title of 15 years or more, before the time of the alleged trespass; or a prior possession or seizin in himself, or a tenancy under him.—Or that the defendant would be entitled to a verdict.

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The defendant further requested the court to charge the jury, that, if the defendant had a license, in fact, to enter upon the premises, this would render his entry legal, and the taking of an excess of timber, or an abuse of the license, would not render him a trespasser *ab initio*, and that, under that part of the case, they should find a verdict for the defendant.

The court declined to charge the jury, as requested by the defendant, but charged, as follows :

That, for the purpose of this action, a sufficient title had been shown, if the jury believed the testimony ;—that the licenses to take the fallen timber would not protect the defendant, in having felled and taken away standing timber ; but that they might return a verdict for defendant, if they found the license to include both standing and fallen timber ;—That, if they found for the plaintiff, they should give to the whole extent of the trespasses, proved to have been committed by defendant on lot No. 26, by felling and taking away standing timber, during the time mentioned in the declaration, and one half of the damages, so proved on lot No. 31.

Verdict and judgment for the plaintiff, and exceptions by defendant.

J. Sawyer & H. P. Smith, for defendant.

1. The vendue deed exhibited, for color of title, from Lothrop, is void, even for that purpose, without showing the regular proceedings of a vendue, which was not attempted.

The proprietors' records were determined to be bad—but admitted to aid in making out a practical division.

What is necessary to make a practical division ?

1. That the town has been allotted or run out by lines and corners, marked and numbered.

2. That this has been done for a long time, and that a plan has been made, or a book of the survey kept, and that, under

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this, the land has been bought and sold. These things raise a presumption that the town has been allotted and drafted.

No surveyor's plan was offered, no evidence was given what the original plan was, or how far it corresponded with the one introduced.

II. The plaintiff did not make out any title to the premises, except a license, shown on his part, to Newland to take the fallen timber—in effect to commit a trespass.

The abuse of the license would not make the defendant a trespasser *ab initio*.

This doctrine has been uniformly sustained, as law, since the six carpenters' case, almost down to the present time. 2 Black. Rep. 1218. 1 Term Rep. 12. *Philips v. Brown*, 9 East. Rep. 298. Bigelow's Digest. 486, 487. Comyn's Digest. 517. 10 New York, Rep. 253. Yelverton's Rep. 86. 1 Salkeld's Rep. 221. 3 Wilson's Rep. 20. Cro. Jac. 147, 148. Buller's, N. P. 81. 1 Cowper's Rep. 414. 3 Black. Com. 14, 15. 2 Johnson's Rep. 191. 1 Swift's Dig. 516. 1 Chitty's Pleadings, 207. 12 N. Y. Rep. 408. 13 id. 414. 11 id. 338.

S. A. Willard, for plaintiff.

The case contains three points for the examination of the court.—

I. The identity of the lots, in which the trespasses are alleged to have been committed.—

II. The plaintiff's title thereto.—

III. The effect, upon the form of action, of a license to enter upon the land.

I. It was shown by a certified copy of the charter, that Jonathan Brewster and Elihu Marvin were original proprietors of the town of Hydepark.

It then became necessary to show a division draft of the town, to do which, the plaintiff offered in evidence what was called the proprietors' records. These were objected to, but admitted to be used in connection with other evidence, to make out a division draft. The ground of the objection does not appear, nor are the records referred to. Of course, no argument, for or against them, can avail any thing.

The best evidence, which the nature of the case will admit of, is always required. To prove a division draft of a town, among the proprietors, the records would be the best evidence. If no records can be found, witnesses may be called to prove the fact.

When a town has been allotted, and lines and corners made to the lots, after many years acquiescence, in the absence of all other proof, a practical division may be proved and relied on. In the present case, what was called the proprietors' records, together with the town records, were given in evidence, and a practical division proved by witnessess. And having resorted to all the modes of proof, it is presumed the court will sustain this part of the case.

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II. Possession, under color and claim of title, at the time the trespasses were committed, is sufficient title on which to maintain this action against a stranger. And an entry upon land, under color and claim of title, and taking timber therefrom, and licensing other people so to do, at different times, and selling and conveying part of the lot, on which the entry is so made, and licenses so granted, constitute such a possession in the person making such entry, as will enable him to maintain this action against a stranger committing trespasses thereon. Such was the opinion of this court in *Doolittle v. Linsley*, 2 Aikens' Rep. 155.

Defendant and Noyes recognized plaintiff as the owner of the lot, when they purchased the mill privilege of him and took a deed of it in 1825.

Selling the land for a mill to be erected thereon, claiming the whole of the lot from which the same was sold, and selling timber at the same time and to the same persons, could not have been taken as mere acts of trespass in Sawyer, but the whole carried such an appearance of claim of ownership as would have made Sawyer liable to the owner of the land, in an action of ejectment, as soon as the timber was taken.

Defendant claimed no title but acted under a license from the plaintiff, and the plaintiff made the act his own by granting the license. If, by these acts, the plaintiff, on the 1st day of May, 1828, had acquired a possession of the land, sufficient to render him liable in ejectment to the rightful owner, (if there had been any other owner than himself), he certainly had sufficient title to enable him to maintain the action of trespass, against persons having no title nor claiming any.

In relation to lot No. 31,—the vendue deed from Lothrop to Sawyer and McDaniel; Sawyer and McDaniel's sale of part of said lot to Smith, in 1826; the licenses proved to have been given by Sawyer and McDaniel to other persons to enter upon the lot

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and take timber therefrom ;—all prove a possession under color and claim of title.

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The defendant, by obtaining licenses of the plaintiff to enter upon the land, from time to time, to do certain acts authorized by the license, and committing trespasses at the same time, and pretending they were authorized by the license, admitted the plaintiff's title.

If obtaining licenses was not an admission of title, setting up the same as a defence to this suit, and relying thereon, as matter of justification of the breaking and entering, was certainly an admission of title.

By every rule of practice yet adopted in courts, the defendant, by justifying the act complained of, has been held to acknowledge or admit the plaintiff's title to the thing injured, and right to recover for the injury done, provided the justification was not made out, and certainly no reason can be given why the rule should be abandoned in this case.

It may be contended that it is only in special pleading where the rule contended for prevails ; that, it being one of the qualities of a special plea that it admit the facts stated in plaintiff's declaration, had the defendant pleaded the licenses specially, he must have admitted the plaintiff's title to the land, in order to set up the licenses in defence, but having pleaded the general issue, he can avail himself of them, without admitting the plaintiff's title.

The answer to all this is, that special pleading is only a rule of practice adopted by courts, and in cases where the act complained of by the plaintiff is not denied, but a right to do the same is claimed by virtue of a license coming from the plaintiff, courts have said that such claim of right shall be shown by a special plea, and this is done for the purpose of apprizing the plaintiff that he must bring no witnesses to prove his declaration, but must come prepared to resist the plea.

It is the fact pleaded, and not the mere manner of pleading it on paper, that gives to it the effect which usually follows. If the defendant plead the general issue first, and then the special matter, in due form, the operation is the same. If he plead the general issue, and give notice of the special matter, the effect is the same. If he attempt to prove it, and set it up in defence, or, in the latter case, if it come out in proof from the plaintiff's witnesses, and under the plaintiff's own showing, if the defend-

ant avails himself of it, he admits the title, if he does not admit it by obtaining the licenses in the first instance. So that it matters not whether it be pleaded specially, or notice be given under the general issue, or it be given in evidence under the general issue. For if the defendant set it up as a defence, and prove, or attempt to prove or avail himself of it, if proved by the plaintiff, it is a sufficient admission of title in the plaintiff to warrant a recovery in his favor, provided the defendant fail to make out his justification.

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III. A license to enter upon land, for certain limited purposes, cannot be extended to any other purposes than those to which it was so limited, and if the person so licensed does any other act upon the land than such as was warranted by the license, and for which an action of trespass for breaking and entering could be maintained, provided no license had been given, the same form of action can be sustained, notwithstanding the license, and if the license be pleaded specially in such case, and the plaintiff rely on the abuse as a substantive cause of action, or distinct injury, for which he is seeking to recover compensation, he must new assign the excess or abuse, and show by the new assignment, that he brought his suit for other and different trespasses than those covered by the license. See 1 Chitty Pl. 516, 517, 547. 5 Wms. Cases, 805. 3 B. & A. Rep. 443. 1 Saund. Rep. 300, a. 2 id. 5. *Hubbell v. Wheeler*, 2 Aik. Rep. 359.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is an action of trespass *quare clausum fregit*. The close, of which the plaintiff declares that he is seized, is described as Lot No. 26, in the division laid to the right of Jonathan Brewster, and Lot No. 31, in the third Division of the original right of Ekhu Marvin, in Hydepark. To maintain this action, it became necessary for the plaintiff to shew either a title or a possession of the premises, and, that defendant had committed the injury complained of; and it also became necessary for the plaintiff to shew, that the lands, where the trespass was committed, had been severed or located to the rights, and set apart as the lots, numbers, and divisions described in his declaration.

In the action of trespass it is sufficient for a plaintiff to prove a possession of the *locus in quo*. A mere prior occupancy, however recent, is sufficient against all, except those who can

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prove an older and better title. The case of *Catteris v. Cosper*, 4 Taun. Rep. 547, decides, that very slight evidence of possession, is sufficient to enable the occupant to maintain the action against the wrong-doer. Possession implies an entry on the land, and, without title, such an entry is in itself a trespass on the real owner, yet, a series of such trespasses, continued for fifteen years, extinguishes the right of the real owner, and gives a title to the occupier. To constitute a possession, no doubt, there must be an exercise of acts of ownership on the land itself. It is not necessary that the land should be enclosed by a fence, as is sometimes understood. Indeed, the court, in the case of *Jackson v. Schoonmaker*, 2 Johns. Rep. 230, attached no importance to the fact, that land had been enclosed by a possession fence. In the case of *Ellicot et al. v. Pearl*, 10 Peters' Rep. 412, it appears that the circuit court were requested to instruct the jury, in effect, that possession must be taken either by an actual residence or enclosures. They instructed the jury that if they found the defendant had had possession by an actual residence, or by improvements, with the intention of taking possession, it was sufficient. This charge was sanctioned by the Supreme Court of the United States. In giving the opinion of the court, Justice Story remarks, that "the erection of a fence is nothing more than an act, presumptive of an intention to assert an ownership and possession over the property. But there are many other acts, which are equally evincive of such an intention of asserting such ownership and possession, such as entering upon lands and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, &c. under a color of title." Similar to this, was the decision and language of the court in this State, in *Doolittle v. Linsley*, 2 Aikens' Rep. 155. The action was for a trespass on a timber or wood lot. The plaintiff only proved a claim of title, and that he got wood and timber on the same for two years. The court instructed the jury, "that, if the plaintiff had commenced the first possession upon the lot, by cutting timber and wood thereon, (the same having been previously surveyed, and the lines marked,) claiming title thereto, and had continued that possession, by repeatedly getting timber and wood from the lot, he could maintain this action against a stranger." This charge was sanctioned by the supreme court, and they considered those acts done by the plaintiff, connected with his claim of right, as sufficient, if

continued for fifteen years, to give a title by the statute of limitations. It is to be noticed, that, in all these cases, great stress is laid on the claim of title. The same acts and doings might be considered as acts of trespass, or of possession and ownership, according to the claim set up by the person performing them. Cutting wood and timber from year to year, disclaiming any ownership, or perhaps without any claim of title, might be considered as nothing more than trespass, and no evidence of possession; whereas, the same acts on a lot of land marked out, or the boundaries of which were designated by a survey or deed recorded, or by known and acknowledged metes and bounds, and under a claim of title, would be treated as unequivocal acts of possession. Cutting wood on one's own land, is an act of ownership, but on the land of another, a trespass. There can be no doubt, in the present case, but that the claim of title, on the part of the plaintiff, was an important item in the proof, as establishing the fact of his possession. The deed from Matthew Franklin to him, dated 30th October, 1811, shews that he had a claim of title to the right of Jonathan Brewster, as there is but one right of that proprietor in the town. The vendue deed from Lothrop to the plaintiff and McDaniel of the right of Elihu Marvin, shews a similar claim to that right, and it did not appear that any other person had ever claimed those rights, or set up any claim to the lots in question.

In the order of the trial, the plaintiff endeavored to shew that the *locus in quo* was severed to the divisions and rights as set forth in his declaration, and for this purpose, he introduced evidence to shew a division and draft. Without entering particularly into the evidence, it is sufficient to say, that we consider the testimony as properly admitted, and the division and draft as proved. It shews a division in fact, acquiesced in by all the proprietors, or, at least, not questioned by any. It is scarcely possible to prove a legal division in any of our old towns. Hence, all, which has ever been required, is to shew a division in fact, and this pre-supposes, that no evidence of a legal division exists. An imperfect division, evidenced by a plan, or even by parol, acquiesced in by the proprietors, is always held as a good division, binding on them, and clearly is good against strangers. The defendant in this case had recognized this division, so far as it respects No. 26, by accepting a deed of part of the same.

Considering that the plaintiff had shewn a claim of title to

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the rights of Brewster and Marvin, and that the lots No. 26 and 31, were set apart to those rights, we must next inquire, whether the evidence established such a possession in him, as to enable him to maintain the action of trespass against a stranger, according to the principles already advanced. The court charged the jury, that, for the purposes of this action, a sufficient title had been shewn, if the jury believed the witnesses of the plaintiff. We coincide in the opinion with the court below, that the testimony on the part of the plaintiff was sufficient, but in reviewing their decision, it will not be expedient to separate the testimony of the plaintiff from that introduced by the defendant, but to examine the evidence in connection.

It appears that, previously to 1828, Newland, the defendant, had leave to enter upon lot No. 26, and take therefrom the fallen or down timber, saw the same on shares, and render to the plaintiff his share; and that he did so enter and take the down pine timber. That of No. 31, the Marvin lot, claimed by plaintiff and McDaniel, they sold fifty acres to one Smith, although no deed was given, and Smith built a log house thereon, and then abandoned it;—that plaintiff and McDaniel, who were generally reputed owners to both lots, licensed other persons to take timber on both lots;—that the plaintiff sold a mill privilege on lot No. 26, to the defendant and one Noyes, and gave them permission, on the completion of the purchase, to take all the timber, except pine, which they might need about the erection of the mill dam, floom, &c., and they accordingly did so from time to time, and spruce timber had been cut and used in and about said mill dam. The defendant gave evidence, tending to prove another agreement, by which he had permission to take the standing pine timber, and that in pursuance thereof, both green and old timber were taken from both the lots, sawed into boards and divided; that the boards were stuck up at the mill, marked "Sawyer," and "McDaniel and Sawyer," part of which had been removed by plaintiff, and a large part thus marked still remained. The claim of the defendant, that he took this timber by permission of the plaintiff, was at least, an acknowledgment that the plaintiff claimed, or had title to the lands in question. It is to be observed, that these acts of the defendant or Noyes, done by the permission of the plaintiff, are to be considered as though done by the plaintiff himself. These several acts, done and performed from time to time, from

before the year 1828, to the commencement of this suit, the plaintiff, claiming to be the owner of the lots, must be considered, as they ever have been, as acts of ownership and possession, on the part of the plaintiff;—so much so, as to have subjected him to an action of ejectment at the suit of the true owner, if there is any other owner but him and the representatives of McDaniel, and if continued for the period of fifteen years, would have given them an absolute title against every one. The case of *Doolittle v. Linsley*, to which we have already adverted, as well as the other cases, are decisive that the plaintiff had a sufficient possession to maintain this action against a stranger to the title. These are probably the principal questions involved in the controversy between the plaintiff and the defendant. There are, however, some other questions of minor importance, to which our attention has been called, and which must be noticed.

As it regards the license, it is to be observed, that, from the charge of the court, the jury must have found no license given to cut the green or standing timber. Nor can we see, from the case as presented, how any question in relation to the license, as a defence, could have arisen. No license was pleaded, but evidence, it appears, was received without objection, and the attention of the court was directed to it. The defendant could not, without a plea or notice, rely on the license as a justification. The evidence introduced by the plaintiff, on the subject, showed the acts done by the defendant, by plaintiff's permission, as acts of ownership done by himself. For what was done by his permission is considered as done by him. The defendant was not, on this account, entitled to rely on it as a justification, without a plea to that effect. Nor can the plaintiff contend, that the defendant was estopped to deny his title. A plea of justification admits a title, but if pleaded with the general issue, the plaintiff must still give evidence of his title. On the evidence, the court was requested to charge the jury, that, if the defendant had a license in part to enter upon the lot, his entry would be legal, and that, if he exceeded his authority, he would be liable for the excess in this action. The distinction between an authority in law, an abuse of which renders the person a trespasser *ab initio*, and an authority in fact, when such license is exceeded, and the person is liable only for the excess, is familiar. From the remarks already made in relation to the plea, as well as from the evidence detailed, it is obvious that no ques-

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tion, arising on this distinction, is here presented. There is nothing by which we can learn, that the defendant entered for a lawful purpose, to wit, to cut the fallen timber, and then exceeded his permission ; but on the contrary, the whole purpose and intent of the defendant may have been to cut the green timber, for any thing which appears in the case. But further, if the defendant had pleaded a license to enter, the plaintiff could have replied the excess, and recovered therefor, if the evidence was sufficient. And if he pleaded the general issue and gave notice of a license, the plaintiff could then have recovered for what the defendant had done beyond the limits of his authority. This doctrine was established in the case of *Hubbell v. Wheeler*, 2 Aikens' Rep. 359. The jury, as has been remarked, must have found no license to cut the timber ; so that if the pleadings had assumed a shape to present these questions distinctly, the result must have been the same. From a view of the whole case, we are satisfied the plaintiff showed a sufficient possession of the *locus in quo* ; that the defendant set up no justification in such a manner as that he could have availed himself of it, if the facts would have warranted it ; and from the evidence and the finding of the jury, it is evident he was not justified in entering upon the land and cutting the timber, for which the suit was instituted.

The judgment of the county court is, therefore, affirmed.

GRAND ISLE COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " SAMUEL S. PHELPS, }
 " JACOB COLLAMER, } *Assistant Justices.*
 " ISAAC F. REDFIELD. }

GEORGE W. GOODRICH v. GEORGE MOTT.

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A receipt, which contains no contract, although executed at the same time, and in reference to the same subject matter of the contract, need not be produced in evidence of the contract.

And if such writing or receipt contain the contract, and is not in the power of the party, it need not be produced.

If an attorney receive a demand for collection, and the debtor leave demands with the same attorney for collection, the avails to be applied on the first demand when realized, this creates no lien on the demands left by the second creditor, in favor of the first creditor or of the attorney, for the security of the first debt.

In such case, the attorney, in making the collection for the second creditor, acts solely as his attorney, and such creditor has the right to control such demands, without consulting the attorney.

In order to create a lien for the security of the first debt, a contract to that effect is necessary, which should be distinctly notified to the officers and debtors, in the secondary collections, or they will be allowed to take the directions, and make payment to the nominal creditor in the execution.

How the officer may make the execution his own, by acts, showing his intention, understandingly made, to adopt them as such.

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This was an action of trespass on the case against the defendant for neglect of duty, as constable of Alburgh, in not collecting an execution in plaintiff's favor, against Emerson, Hazen, and Reynolds, issued on a judgment rendered by the county court, for this county, at their April Term, 1834.

It appeared in evidence, on trial of this case in the county court, before the jury, that Giles Harrington, an attorney, had in his hands, for collection, a demand in favor of one Root, of Troy, N. Y., against this plaintiff, signed by one Ladue, as surety. Goodrich and Ladue, in order to raise the money for Root, put the note in plaintiff's favor against Emerson, Hazen, and Reynolds, into Harrington's hands for collection, the avails, when realized, to be applied on Root's demand. Harrington *received* the demand, in the usual mode, *to Ladue*. The above execution was obtained on this demand, and by Harrington put into defendant's hands for collection, and by direction of plaintiff's attorney, levied upon certain property of Hazen. Hazen and defendant both knew the purposes, for which Harrington was collecting the execution, and Harrington never consented that Goodrich or Ladue should control it, but they did so control the collection of it, that nothing was or could be collected on it, to which defendant assented, without consulting Harrington, and the demand of Root has remained all along uncollected.

It appeared that defendant had sometime procured an alias execution on the judgment, and had made a commitment thereon, with a view to his own indemnity, and that, during the pendency of this suit, he had paid Harrington fifty dollars, in consequence of his own liability.

In the course of the trial, the defendant called for the production of the receipt, executed by Harrington to Ladue, as being the primary evidence of the contract, by which Harrington received, and was collecting the demand. The court held the plaintiff not bound to produce it, without notice.

The court charged the jury, that, "if the demand had been lodged with Harrington, as attorney of Root, under a contract that he should collect it, and apply the avails on the demand in favor of Root against Goodrich and Ladue, that contract created a lien on the demand for the benefit of Root, which neither this defendant, nor the debtor in the execution, could defeat, provided they acted with notice of such contract. If,

"therefore, they found the contract proved, and found the defendant had reasonable notice of it, they would consider any assignment or agreement of the plaintiff and Ladue, to what the defendant did, of no avail in his defence."

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To the foregoing decision and charge the defendant excepted.
Smalley & Adams, for defendant.

G. Harrington, for plaintiff.

1. The defendant having given plaintiff no notice to produce the receipt, the latter was not bound to produce it.

2. If the demand was legally in Harrington's hands, for the benefit of Root, and notice of that fact carried home to the officer and the plaintiff in the execution, the interference of Goodrich and Ladue, ought not to have been regarded by the defendant. *Lampson v. Fletcher*, 1 Vt. Rep. 168. 2 Aikens' Rep. 373, *Strong v. Strong*, and the cases there cited,

The opinion of the court was delivered by

REDFIELD, J.—The decision of the court, in relation to the receipt of Harrington, was undoubtedly correct. It does not appear that this receipt contained any contract or expressed the terms, upon which Harrington was to collect the demand. If it was a receipt in the usual form, it would not. Had it contained the contract, by which Harrington claimed a lien upon the demand, distinct from the interest of Goodrich and Ladue; it not being in the power of the *real* plaintiff, Root, but of the defendant, the former could not be required to produce it. For the rule, requiring the plaintiff to produce the best evidence his case admits of, is always to be qualified by the consideration that it must be in his power. And if Ladue is to be considered as the real party defendant in this suit, he could not be compelled to testify or to produce this paper, on a *subpœna duces tecum*, and therefore the paper was not in the power of Root, who is the real plaintiff.

Upon the other part of the case, we think the testimony did not tend to show any specific assignment of the demand to Root, either by way of sale or collateral security. It would seem rather like an assignment by Goodrich to Ladue, who was his surety, and that, in the collection, Harrington acted as the attorney of Ladue; and that Ladue really had the exclusive control of the demand. This is in substance the common case of an attorney, staying one collection at his own risk, for the purpose of being employed in other collections, the avails of which it is un-

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derstood shall go to liquidate the first demand. In such cases, it is always considered, that the attorney in the second instance acts as the attorney of the creditor in the recovery of the demands, and that such creditor has the control of the collections, until the money is realized, when the attorney has the right to apply it on the first demand, but that neither he nor the first creditor has any interest in the demands. Such, we consider, the testimony tended to show this case, and the charge, in this particular, was erroneous.

In order to create a *lien* in favor of Root, there should have been a distinct contract to that effect, and this should have been unequivocally notified to defendant, or he would be fully warranted in taking the direction of the judgment creditor and Ladue, as he did.

The acts of the defendant, in paying fifty dollars and in taking out an alias execution and making a commitment, might have been important in another view of the case, not presented by the counsel, i. e. in showing that defendant had adopted the execution and made it his own. Or they might have been done under a mistake of the facts, in relation to Harrington and Root's interest in the demand, or for the purpose of buying his peace, and to induce a compromise, in which sense they would not be important. But as this point was not presented to the jury, it is only important with reference to a future trial.

The judgment of the county court is reversed and a new trial granted.

ADDISON COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.
 " STEPHEN ROYCE, }
 " SAMUEL S. PHELPS, } *Assistant Justices*.
 " ISAAC F. REDFIELD, }

PHELPS & BELL v. NATHAN WOOD.

Addison
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The jurisdiction of a justice of the peace, in the action book of account, is not affected by a charge made through mistake.

Neither is the jurisdiction, in such case, affected by the accruing interest during the pendency of the suit, or by a charge of interest, which the plaintiff *might* recover, if the suit would warrant a recovery to that extent.

Whether services, charged in plaintiff's account, were performed by him, at the request of defendant, is a matter of fact for the auditor to determine, and, unless it appears that he found the fact, without any evidence, it cannot be assigned as error.

If the plaintiff bring a suit before a justice of the peace, who once continues the cause, and is absent at the second time appointed, by which the suit is necessarily discontinued, he may bring another suit within one year after such discontinuance, and the statute of limitations will not be a bar to the suit, unless the cause of action had become barred before the commencement of the former action.

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Such discontinuance, although not within the terms of the proviso of the statute of limitations, in relation to suits failing of trial on the merits, is so far within the equity of such proviso, as to prevent the statute from attaching.

Those general provisions, in our statute relating to judicial proceedings, which are framed with particular reference to the county and supreme courts, must, when necessary, be applied to justices' courts, with such qualifications, as are requisite to effect the object intended by the legislature.

This rule of construction is peculiarly applicable to statutes of limitation.

This was an action of book account, sued before a justice of the peace, and carried, by appeal, to the county court, and referred to auditors. By the report of the auditors, it appeared that the plaintiffs' account, as presented before them, contained one item of interest of \$10, and that the sum of the debit side of such account was \$100,58, upon which the defendant contended, that the county court had not appellate jurisdiction of the cause.

The plaintiffs, also, charged the defendant a bill of cost in chancery, in a bill of foreclosure, in favor of one Hart against Dickenson and others, upon lands in Middlebury, upon which defendant had a subsequent mortgage. It is found by the auditors, that the bill of foreclosure, although in the name of Hart, was for the benefit of defendant, he having contracted to buy the premises, which contract was afterwards consummated, and defendant having paid to plaintiffs another bill of cost in ejectment, in regard to the same subject matter, and between the same parties. From which, and other similar circumstances, the auditors find that the bill was brought at defendant's request, and allow the charge against him.

It was conceded on trial, by both parties, that two of plaintiffs' charges against defendant, of \$5 each, were charged by mistake, and should not have been entered against defendant at all. These charges, and that for interest were disallowed.

The last charge in plaintiffs' account was more than six years anterior to the date of his writ in this suit, and the action was admitted to be barred by the statute of limitation, (which defendant insisted upon before the auditors,) unless it was saved by a former suit, brought by plaintiffs within six years, before a justice of the peace and by him once continued, and, the justice being absent, at the time, to which the cause was continued, the

suit failed, without the fault of the plaintiffs, and this suit was brought immediately after, six years having elapsed before the discontinuance of the former suit. The auditors reported in favor of plaintiffs, and the county court accepted the report.

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Starr & Bushnell, for defendant.

From the facts found by the auditors, the plaintiffs are not entitled to recover.

I. The auditors do not find that the plaintiffs were employed by the defendant to foreclose the mortgage, or that the defendant ever agreed to be accountable for the costs of the foreclosure, one of which facts was necessary to be found explicitly, to enable the plaintiffs to recover, the defendant not being a party to the foreclosure. The auditors merely say that, from certain facts and circumstances, (which they state,) they infer that the foreclosure was prosecuted by defendant's advice and consent; which is not a sufficient finding in this case.

II. The action was barred by the statute of limitations. If the taking out of the previous writ by the plaintiffs would have prevented the operation of the statute, under some circumstances, it did not in this case.

The previous suit was abandoned *voluntarily* by the plaintiffs, any justice of the peace in the county having power, by the statute, passed Oct. 6, 1832, to adjourn the cause.

III. The court had not jurisdiction of the case. The debit side of plaintiffs' book exceeds \$100. The error in the charges, admitted to have been made by mistake, was discovered on trial, and was not apparent on the plaintiffs' account. The charges by mistake, which have been decided not to have the effect to take the jurisdiction from the justice, are those where the mistake is apparent on the account, or is made so by the plaintiff, by a credit of the error, on the presentation of his account. *Catlin v. Aiken*, 5 Vt. Rep. 179. *Stone v. Winslow*, 7 id. 338.

S. S. Phelps, for plaintiffs.

I. As to the question of jurisdiction.

1st. This case falls within the principle of *Catlin v. Aiken*, 5 Vt. Rep. 177.

The account is made to exceed the limits of a justice's jurisdiction, by an error apparent on the face of the account.

Certain charges are, by mistake, footed and posted twice from

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the dockets, and by this means the footing of the account, including the same item twice, is made to exceed one hundred dollars.

Suppose the plaintiffs are turned round to their suit in the county court, would they not be obliged to treat their claim as less than \$100?

Again, suppose the plaintiffs had, upon hearing before the auditors, entered a counter credit to correct the error, would the case have been different?

How is this case different from a misfooting of the account?

2d. The account is made to exceed the jurisdiction of the justice only by the addition of interest. Exclude this, and the account, including the double charge of the same item, falls within the justice's jurisdiction.

Now, if we deduct the interest, accruing since the trial before the justice, we restore the jurisdiction.

II. Upon the merits of the claim no question of law arises.

The report is somewhat informally drawn, but it contains only a statement of the evidence, upon which the auditors found the facts for the plaintiffs.

III. Upon the question under the statute of limitations we have to say,

1st. That the statute never runs against the party, while he is pursuing his claim by action.

The first suit was brought before the statute had run, and thus the claim was saved.

The accidental failure of the suit, by the absence of the justice, on the day of the trial, would not bring the case within the statute.

Had the plaintiffs voluntarily withdrawn their suit, the case might have been different.

There are but two points of view, in which this statute may be regarded;—As proceeding upon the presumption of payment, or as a mere rule of policy.

The presumption of payment never arises when a suit is brought within the limitation, and most certainly such presumption is not aided by an accidental discontinuance, which, from the constitution of a justice court, often occurs.

Regarding the statute as a rule of policy, merely, we could never apply it to a case like this. If the party brings his action

within the specified period, he complies with the rule, and is not chargeable with negligence. If the suit fail without his fault, and he bring another action speedily, it would be extremely hard to interpose a presumptive bar, founded on no better reason than unavoidable delay.

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The opinion of the court was delivered by

REDFIELD, J.—The first objection to the report is virtually disposed of, by the case of *Catlin v. Aiken*, 5 Vt. Rep. 179. A mere mistake in charge, whether it be corrected by a credit or erasure, or stand uncorrected, is not to affect the jurisdiction of the court. It would be almost too gross an absurdity to merit refutation. When the statute speaks of the “debit side of plaintiff’s book,” as a limit of the jurisdiction of justices of the peace, in actions of book account, it is intended to express the “plaintiff’s book,” as understandingly made up *by him*. Not that the question of jurisdiction is to be made to depend ultimately upon the plaintiff’s *right* to charge, but upon what he did, in fact, charge, as a serious claim, in the shape of book debt. It is not necessary to decide here, what would be the effect of plaintiff’s erasing from his account items of charge, when he abandoned all claim to recover them, if they had been originally and intentionally charged to defendant. It is difficult to perceive how *that* could injure defendant ;—but, surely, a mere mistake, either in charging or posting, should no more affect the question of jurisdiction, than a mistake in footing up the account.

The charge of interest, too, it is equally well settled, does not affect the jurisdiction. *Stone v. Winslow*, 7 Vt. Rep. 338. It would be monstrous injustice to hold, that the *accruing* interest, during the delay occasioned perhaps by defendant’s appeal, should oust the jurisdiction of the court, which alon ehad jurisdiction of the case, when the suit was instituted. But it is evident no charge of interest, unless perhaps interest accruing by express contract, which is not often the case in this action, could so affect the book, that the plaintiff might not be permitted to waive the claim. It is an *accident* of the claim, and not of the substance of the charges, and, like a claim for exemplary damages in trespass, may always be waived.

Whether the defendant employed the plaintiffs to perform the services charged, or they performed them unasked, or for some other person, is a question of fact, resting exclusively with the auditors, and which they have determined, in this case, in favor

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of plaintiffs. And although the testimony might have been doubtful, yet, there being some testimony for them to weigh, we cannot now inquire, whether, upon the whole, they decided as we should have done.

The statute of limitations presents a question of more difficulty. The first suit was commenced in time, and it was *discontinued*, but *without the fault of plaintiffs*. If we hold the debt barred, it was barred without the laches of the plaintiffs; and when no diligence on their part could have prevented it.

If the plaintiffs had discontinued their own suit, or voluntarily become non-suit therein, it is evident they could not rely upon that suit to prevent the operation of the statute of limitations. And the statute, in terms, does not extend to the case of a former suit, discontinued without the fault of the plaintiffs. The statute provides, that when any such suit shall fail, by reversal on writ of error, motion in arrest of judgment, plea in abatement, or on demurrer, "*and the merits of the cause shall not be tried*," the plaintiff may, from time to time, commence another suit within one year after such judgment reversed, &c. It is evident this exception, or proviso of the statute, was intended to reach all those cases, where a suit was brought, and the merits of the action failed to be tried, without the fault of the plaintiff, and the period of limitations had become complete during the pendency of the suit. So that the present suit is clearly within the *equity* of the proviso, although not *strictly* within its terms. It may be said, too, that, should a suit be abated, without a plea, but on motion, as may sometimes be done, the case would not come within the exception. The same is true, where the plaintiff is compelled, by some error in pleading, variance, or otherwise, to become non-suit, without his own fault. And no doubt these and many other cases, not coming technically within the terms of the proviso, would still be held to come within its equity.

Such, indeed, has been the construction of the statute of limitations, that many cases, not within the equity of the statute, but within its terms, have been excluded from its operation. Any fact, which goes conclusively to rebut the presumption of payment, from the lapse of time, is permitted to obviate the effect of the statute. A new promise, even in the case of debt on judgment, is held to have this effect. *Gailer v. Grinnel*, 2 Aik. Rep. 349. What has been said, in some of the cases, of a new promise, giving a new cause of action, founded on the

consideration of the moral obligation to pay the pre-existing debt, has very little application to the action of debt, and is rather specious, than substantial, as applied to the action of assumpsit. The true reason, why a new promise takes any case out of the statute of limitations, is, that it conclusively rebuts the presumption of payment, and shows the case not within the equity of the statute.

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In *Ferris v. Barlow*, 8 Vt. Rep. 90, it was held, that the time, during which a debtor remained in jail, would not be reckoned in computing the eight years from the rendition of the judgment, in order to fix the time of such judgment being barred, and that, after his release from jail, the statute would begin to run, as from the rendition of the judgment. In *Hall v. Hall*, 8 Vt. Rep. 156, it was held, that the statute of limitations will not operate upon a judgment apparently satisfied by levy upon lands, acquiesced in by both parties, although defective and afterwards so adjudged.

In the case of *Baxter v. Tucker*, 1 D. Chip. Rep. 353, it was decided, that the statute of limitations did not run against a *scire facias*, brought to revive a judgment, when the execution had been levied upon property not the debtor's. These cases are all decided upon the principle of regarding the spirit and intent of the statute, rather than the strict interpretation of its terms. We are inclined to adopt the same doctrine here, because we think it just and well warranted, by decided cases in reference to this subject. As a general rule, I should be averse to adopting such a rule of construction, in regard to other statutes, as being unsafe and unsatisfactory. But statutes of limitations regard the remedy, and, being founded upon an arbitrary ground of presumption, require to be liberally expounded to prevent injustice. To such an extent have the courts, in some instances, carried this doctrine of the equitable construction of the statutes of limitations, as to infringe their just operation. But, in deciding the present case, within the proviso of that statute, saving causes when the merits have not been tried, we do not intend to countenance such latitudinarian construction, as has sometimes been attempted.

It is evident this proviso has reference, in its phraseology, to the county and supreme courts, and would not be likely specially to enumerate cases, which could not there occur. A case there could never be discontinued on account of the absence of the court, for the sheriff in such case, is to adjourn the court.

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But in causes before justices of the peace, there is no provision for the cause being continued in the absence of the justice, except "on the day set for trial," which has been decided not to apply to causes once continued. *State v. Bates*, 3 Vt. Rep. 320. This, then, undoubtedly is a *casus omissus*, and, as such, ought to be considered within the equity of the proviso. The same may be said of the provision of the statute for surrendering the principal in court, in discharge of the bail, pending the original action. The provisions are applicable, more particularly, to the higher courts, but must be applied, *mutatis mutandis*, to justices' courts.

Judgment affirmed.

RUTLAND COUNTY.

JANUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

"	STEPHEN ROYCE,	} <i>Assistant Justices.</i>
"	SAMUEL S. PHELPS,	
"	JACOB COLLAMER,	
"	ISAAC F. REDFIELD,	

JESSE LAPHAM v. JOSEPH R. GREEN.

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- ✓ The party in interest in a contract, resting in parol, may sue upon it.
- ✓ In contracts, made by agents, without disclosing the principal, the suit, to enforce them, may be in the name of the principal or agent.
- A dormant partner may join in a suit, or not, at the election of the plaintiff.
- In such cases, when the suit was not brought in the name of the party contracting ostensibly, the defendant will be entitled to make any defence, which he could have made, had the suit been in the name of the person, with whom the contract was made.
- ✓

This was an action of book account. The only question, submitted to this court, arose in relation to an account of \$44,86, which accrued while the business of the plaintiff, as a merchant, was carried on in the name of two of his brothers, Daniel and Anson, under the style of D. & A. Lapham.

It appeared that plaintiff had been in business as a merchant, for some years previous to Sept. 1827, at which time he hired

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the two brothers above named, at a stipulated price, to carry on his business in their own names, in which they had no interest, except as mere agents, but, both by the plaintiff and them, it was distinctly notified to the world, that they were the sole owners of the business. At the end of one year, the plaintiff resumed the business in his own name.

The defendant had paid into the store, during that year, \$9, 84, which had been credited on the books kept by D. & A. Lapham, and defendant had taken it from their books and charged it on his account.

The auditors disallowed both these charges, and found a balance for defendant. The county court allowed both the debt and credit, and gave a judgment on the report, for plaintiff, of \$10,83. The case comes here for revision.

S. Foot, for defendant.

The manner, in which D. & A. Lapham conducted the business of the store, made them partners, at least, as between themselves and the world; (Gow on partnership, 11 and 15, inclusive, and the cases there cited,) and, as such, they assumed a joint responsibility.

As between themselves and the public, they were not the agents or factors of the plaintiff, nor doing the business under a commission for his benefit. Third persons would have no concern in, as they could have no knowledge of any private arrangement between the plaintiff and the ostensible firm of D. & A. Lapham, and their interest or liabilities could not be affected by any such arrangement.

The plaintiff having publicly announced the sale of his stock in trade to said firm, and having thus disclaimed all interest or connection in the business, he cannot afterwards come in and, by controverting his own declarations, claim an interest, in whole or in part, in the debts of third persons, contracted with the firm.

The legal interest in a simple contract resides with the party, from whom the consideration moves, notwithstanding it may enure for another's benefit. Hammond on parties, 6 & 7.

There was no privity of communication between the plaintiff and defendant, as to the account made with D. & A. Lapham; therefore, the plaintiff could not maintain a suit for it. 2 Taunt. Rep. 324. The plaintiff was a stranger to the consideration, and could maintain no action. 1 Str. Rep. 592. He cannot, therefore, have the account allowed him in this case.

This case differs from the case of *Hilliker v. Loop*, 5 Vt. Rep. 116, and the case of *Boardman v. Keeler & Allen*, 2 id. 65, inasmuch as the contract, in both those cases, was made with the plaintiff. In this case, the plaintiff was unknown in the contract, and had disclaimed all interest in the concern, and had asserted the entire interest to be in D. & A. Lapham, with whom the contract was made, or, in whose favor it would be implied. And to allow the plaintiff now to come in to falsify his own public acts and declarations, and to claim the benefit of a third person's liability, contracted under the faith of those very acts and declarations with a firm of his own creation, would be giving to imposition and fraud upon the public the countenance of judicial sanction.

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P. Smith, for plaintiff.

I. The principal, and not the agent, is legally interested in a contract made by the agent; and this, when the principal is concealed. Chit. Pl. 5. Hammond on parties, 6, 32. *George v. Claggett*, 7 T. Rep. 359. *Wilson v. Poulter*, Str. 859. *Barber v. Dennis*, 1 Salk. 68. *Triswell v. Middleton*, Cro. Jac. 653. *Hilliker v. Loop*, 5 Vt. Rep. 116.

II. In this case, no injustice will be done to the defendant, since his set-off is allowed, the same as if the suit had been brought in the name of the plaintiff's agent.

The opinion of the court was delivered by

REDFIELD, J. In the case of a dormant partner, which is quite analogous in principle to the present, it has long been settled, both in this state and in Westminster Hall, that he may join, or not, at the option of the plaintiff, and, in either case, the joinder or omission is no ground of abatement, or nonsuit, or writ of error. *Skinner et al v. Stocks*. 4 B. & A. 437. *Hilliker v. Loop*, 5 Vt. R. 116, and cases there cited by the Chief Justice.

We consider it as well settled, that, when business is transacted in the name of those not interested, the action may be brought in the name of those in interest, without joining those, in whose name the contract was made, and the suit may always be brought in the name of the contracting parties. *Teed v. Elworthy*, 14 East 210. *Skinner v. Stocks*, *ubi sup.* *Glossop v. Coleman*, *et al.* Starkie's N. P. Cases, 25.

If an agent do not disclose his principal, the suit may be brought in the name of either. *Young v. Hunter*, 4 Taunton, 582.

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But in each of the above classes of cases, if the suit be not brought in the name of the person ostensibly contracting, the case must be held liable to every defence which would obtain, if it were so brought. In this case, although the plaintiff at one time disclaimed all interest in this year's business, yet it is now shown that it was really his. He was the party in interest and we see no reason why he should not recover.

Judgment of the county court affirmed.

HIRAM K. HUNT & WIFE v. The Town of POWNAL.

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An action to recover damages of a town, or other corporation, for an injury happening through the insufficiency of a road, which it is made their duty by statute to repair, is not local, so as to require the action to be brought in the county where the injury occurred.

Quere: Whether any action could be here sustained for such an injury happening without the State.

(If the road be out of repair, and the injury happen by reason of such want of repair, and the plaintiff or his agents are guilty of no want of care and prudence, the defendants are liable, notwithstanding the primary cause of the injury was the failure of a nut or bolt, which was insufficient, or improperly fastened.

If there be no fault on the part of the plaintiff, which common sagacity and forecast could have anticipated and provided against, and the loss be the combined result of accident and the insufficiency of the road, the plaintiff may recover.)

This was an action on the case for an injury sustained by Mrs. Hunt, one of the plaintiffs, through the insufficiency of a highway in said town. On the trial, the defendants objected to a recovery by the plaintiffs, on the ground, that the injury, complained of, occurred, if at all, upon a highway in the county of Bennington;—that the action was local, and should have been brought and prosecuted in the county of Bennington; but the court overruled the objection, and decided that the action might be brought and sustained in the county of Rutland.

The plaintiffs offered testimony, tending to shew, that Mrs. Hunt, in company with some friends, at the time mentioned in the declaration, was travelling in a wagon, drawn by two horses and containing six persons and their baggage, on her way from Connecticut to West Haven, in Vermont;—that the road, on which the injury complained of occurred, was, at the time and place where and when the injury was sustained, about eleven feet wide, that it ran along at the base of a high, rocky and precipitous mountain on one side, and having a rapid stream, called Hoosack river, which was considerably swollen by rains at the time, on the other side, that the declivity from the edge of the road to the water was quite steep, and of the distance of eight or ten feet, and, to the bed of the river, about fourteen feet;—that the road at that place had been long known as the dug-way, and that the only muniment on the river-side of the road was a small rotten poplar pole, of about four inches in diameter, with

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one end resting on the ground and the other a little elevated ;—that, under this pole, and imbedded in the earth, was another pole rather longer than the former, but which presented no obstacle to a wagon ; running off the bank ;—that as the driver was proceeding carefully along the road at this place, the nut, which had been screwed on the inner end of the bolt, which passed through and connected the left arm of the tongue to the forward axletree, came off,—that the forward wheels thereupon instantly turned nearly at right angles with the road toward the river, struck and broke the poplar pole aforesaid, and the wagon, with all its contents, was instantly precipitated down the bank into the river ; that Mrs. Hunt, thereby sustained a most serious and permanent injury ;—that the road in question was very much travelled—that the wagon was obtained of a Mr. Cooley of Williamstown, was carefully examined and in good and safe condition, when it left Cooley's house, and that, after leaving Cooley's house, they proceeded directly on their way, until they come to the dug-way aforesaid, which is about two miles north of said Cooley's house.

The defendants offered testimony, tending to shew, that the road in question was about sixteen feet wide, smooth and well wrought, that the surface of the road was a little declining from the edge of the river-bank towards the mountain ;—that the wagon was hired of Cooley by Andrus, as agent of plaintiffs, and that it was unsuitable and insufficient to carry and safely sustain the load, with which it was laden at the time the injury occurred ;—that the nut and bolt were insufficient, and that the nut was insufficiently and improperly screwed to said bolt, at the time the wagon was hired of Cooley.

The counsel for the defendants requested the court to charge the jury, that, if they found that the accident would not have happened, and the injury, complained of, would not have been sustained, if the nut in question had not come off, they must find for the defendants. They further requested the court to charge the jury, that, if they found that the accident happened, and the injury occurred from the nut and bolt being insufficient, in themselves, or from the nut being insufficiently screwed to the bolt, they must find for the defendants ; and that it was immaterial whether the insufficiency of the nut and bolt was or was not known to the plaintiffs' agent, when he hired the wagon, and that, if the nut was insufficiently screwed on, it was immaterial

whether this arose from the negligence of the plaintiffs' agent, or of the driver, or of Cooley, the owner of the wagon.

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But the court refused to charge the jury as requested, and did charge that, if they found from the testimony, that that part of the road in question, upon which the accident happened and the injury occurred, was insufficient, and in want of repair, by reason of there not being a proper and necessary railing or muniment on the river-side of the road, and that the injury, complained of, occurred in consequence of such insufficiency and want of repair, and that the plaintiffs' agent, in hiring the wagon, used ordinary care and prudence in examining and ascertaining its soundness and sufficiency, and that plaintiffs' agent and driver, at the time the nut came off, was driving with ordinary care, and, after the nut came off, used ordinary care and prudence in arresting the consequences of the accident, the plaintiffs were entitled to recover. The court, also, charged the jury, that, if they found that the nut came off on account of the insufficiency of the nut and bolt, or by reason of the nut being improperly screwed on, provided that was done by the negligence or want of care in Cooley, of whom the wagon was hired, or of his servants, and not by the neglect or want of ordinary care in plaintiffs' agent or driver, the fact, so found by them, constituted no objection to the plaintiffs' recovery. To all which the defendants' excepted, and the case came here for revision of this court.

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—, *for defendant,*

It is a material averment in the declaration, that the place, where this injury was sustained, was a public highway. This averment was traversed by the general issue, and, on trial, it became necessary for the plaintiffs to prove this such an highway, as the town were under obligation to keep in repair. The existence of this highway was then, not collaterally, but directly in issue, for, if this was not a highway, there could be no liability on the town.

I. It is claimed on the part of the defendants, that this action, at common law, and by statute, is local, and can be sustained only in the county where the injury was sustained.

1. At common law, all actions for the disturbance of a right of way, either public or private, are local, and must be brought in the county where the injury arose. 1 Chit. Pl. 271. *Gould's* Pl. 116. 7 Co. 2, b. A disturbance of this right consists in

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the prevention of that full and perfect enjoyment of the same, as secured by law, and may be effected, either by the erection of obstacles, or by suffering it to be so out of repair that it cannot be thus used and enjoyed. 10 Petersdoff's Ab. 340, margin. Such is the nature of this action. The plaintiffs complain that they have been hindered and prevented from the full, safe, and perfect enjoyment of this right of way, as secured by law, by the neglect of the town to keep it in repair, and that, in consequence of this neglect, they have sustained the injury of which they complain. So also, actions for a nuisance are local—and, in all cases, it is immaterial, whether the injury arose by misfeasance or nonfeasance. Thus actions on the case for the continuance of a nuisance are local. So are actions for permissive waste. 1 Taunt. Rep. 379. 6 id. 29. 4 M. & S. 101. 2 Bing. 263. Saund. Pl. & Ev. 918, 686.

2. All actions are local, in which are put in issue, to be tried, the *right* and *title* of *public* or *private* easements. Such are actions for obstructing and diverting water courses. The right to the use of a stream of water is an easement, and may be either public or private. On this principle was decided the case of *Mercy & Irwell Navigation Co. v. Douglas*, 2 East's Rep. 497, in which case the plaintiffs declared that they were disturbed in the navigation of the river Irwell, by the erection of a dam across said river, by the defendants, to which was pleaded the general issue, thus putting in issue the existence of this public right, and the *action was held local*. This principle must apply to the right of way, for this is also an easement, either public or private, and was so applied in the case of *Spear v. Bicknell*, 5 Mass. Rep. 125. In that case, the plaintiff declared in trespass for breaking and taking away plaintiff's gate, standing on his land. The defendant replied that the *locus in quo* was a public highway, and that it obstructed the use of the same, and that he removed it as he had a right to do, thus putting in issue the existence of this public easement. And the question was, whether a justice could try the same. And it was held that the justice had not jurisdiction over the case, for trying the existence of this right of easement was trying the title to a "real franchise," and would oust the jurisdiction of a court, that had not jurisdiction over titles to real estate. The same principle was also decided in the following cases: *Strout v. Berry*, 7 Mass. Rep. 385. 7 Conn. Rep. 419. The same principle has also

been applied to an action on the case, for the diversion of a private stream of water, and a judgment rendered by a justice, in such an action, has been decided void on *audita querela*.

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It cannot be urged that this question arises collaterally in the case, for it will be perceived that it arises in the same way, as in the cases cited from East's and Mass. Rep. Each of those cases was pending between two individuals for damages, and the existence of a public easement was the foundation of the plaintiffs' action in one case, and of the defendant's defence in the other. So, this is a suit pending for damages, and the existence of this public easement is alleged, traversed, and is the foundation of the plaintiffs' action. If, therefore, in those cases, the existence of the easement arose sufficiently direct to render those actions local, it must, necessarily, have the same effect in the case at bar.

3. It is a general rule, that all actions are local when the cause of action could only have arisen in a particular place or county, and that, where an action is brought in a different county, it is a defect, of which advantage can be taken under the general issue. 1 Chitty on Pl. 284, 271. Saund. Pl. and Ev. 412, 414. The cause of action, in this case, is the neglect of the town to repair this road. The damages, sustained by the plaintiffs, are a consequence of this neglect. The cause of action could arise in no other place or county, and, necessarily, is as local as the highway itself.

These principles of the common law are not altered by our statute, p. 72. Indeed, so far as local actions are concerned, our statute is in affirmance of the common law. The intention of the legislature, in the enacting clause, was manifestly to regulate and *limit* the *venue* in transitory actions, requiring them to be brought in the county where one of the parties reside—if so, they certainly did not intend to *extend* the venue in local actions. The proviso of the act, also, manifestly, (from its phraseology,) was intended to except actions local at common law.

All statutes are to be so construed that the whole may stand or have an effect according to the maxim, *ut res magis valeat quam pereat*. The expression, "trespass committed on the freehold," must refer to other cases than those referred to in the former part of the proviso; under the expression, "actions of trespass." Else it is mere repetition. The true construction of

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this proviso is, that all actions of trespass and ejectment, and all actions for *trespasses or injuries on or to real estate*, shall be brought in the county where the lands lie. This action, therefore, being founded on an injury to this "real franchise," by the neglect of the town to keep it in repair, is rendered local by the construction and express provision of the act. Indeed, if the case in 5 Mass. Rep. is correct, it cannot be contended, that any case that tries the right and title of a public easement, or to real estate, can be tried out of the county where that right exists, either at common law, or by our statute.

II. The statute creates a liability on the town, only "where special damage has arisen by means of the insufficiency or want of repair of said road"—and, in the construction of the statute, it has been uniformly held that the damage must *solely arise* from that cause, and that an action cannot be sustained where the injury arose, partly from the neglect of the town, and partly from the neglect of the party. 1 Vt. Rep. 353. 5 Vt. Rep. 587. 11 East's Rep. 60. 2 N. H. Rep. 392. On this principle, it is insisted that the jury should have been charged, that this action could not be sustained, if they believed, from the testimony, that the accident would not have happened, if the nut had not come off, for, in such case, the injury is chargeable to that event, rather than to the insufficiency of the road.

There was testimony introduced, tending to shew, that the nut was insufficiently screwed on, and was, also, insufficient in itself. Either of those facts, if believed by the jury, would entitle the defendants to a verdict; for, if the injury arose from those causes, or if they partly contributed to the injury, it cannot be said that it arose, solely, from the insufficiency or want of repair of said road. The court charged the jury, that the town was liable if the nut was insufficiently screwed on, if done by Cooley's servants. In this respect, Cooley or his servants were the servants of the plaintiffs, and this negligence was the plaintiffs' negligence. But whether they were or not, if the injury was caused by the nut coming off, and it came off, in consequence of its being negligently put on, by any one, the injury then wholly arose from that cause, and, in no way, can it be said, that it arose solely from the insufficiency of the road. To sustain this action on our statute, the plaintiffs must shew the insufficiency of the road, the exercise of proper care, on their part, and that the injury arose exclusively from the insufficiency of the road. In

this case, the injury arose from the nut coming off, and being insufficient in itself, and being insufficiently put on.

The opinion of the court was delivered by

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REDFIELD, J. It is not necessary to go into the discussion of the ancient learning on the *venue* of actions. That subject is familiar to the profession, and it is well known it had reference to the selection of the jury from the vicinity of the transaction, or the residence of the parties, on some supposed ground of their being, on that account, more competent triers. Experience has, however, demonstrated, that such is not always,—perhaps not often,—the case, and sometimes the reverse is obviously true. In this State, the place of trial is fixed with reference to the residence of the parties, with the exception of the actions of ejectment and trespass on the freehold, which must be brought in the county where the lands lie. When the parties both reside out of the State, or the defendant resides out of the State, and the plaintiff within the State, the suit may be brought in any county in the State. If both parties reside within the State, as in this case, the action may be brought in the county where either party resides. These plaintiffs, residing in Rutland County, had, by the general provision of the statute, the right to bring their suit here. The action does not come within the exception of the statute as to actions of ejectment and trespass on the freehold. The statute has made no other actions strictly local. And we see no good reason why it should have done so. This statute was framed by eminent jurists, and we are not to suppose they were ignorant that many actions, at common law, were local. We think, then, it may well be supposed the legislature did not intend to make any other actions local, with reference to the county. If the cause of action accrued without the State, it would be very questionable whether this action could be sustained;—not that it is an action for nuisance, or for obstructing a public or private way;—but for an injury resulting from the default of defendants to perform a duty, imposed by statute, and in itself concerning, intimately, the internal police of the State. And, in either case, the remedy is confined to the forum of the place, where the cause of action accrued.

In regard to the other point in the case, it is well settled that if the plaintiff or his agent is guilty of any negligence, either in driving, or in the construction or repair of his carriage, harness, &c. whereby the injury is, in any manner, or any part, hastened

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or produced, he cannot recover, although the want of repair of the road might have conspired to produce or aggravate the injury.

But in this case, the jury have found, that the plaintiff's agent was guilty of no such negligence. But they were told by the court, that, although the nut or bolt was insufficient, and this through the neglect of the owner of the carriage, still the plaintiffs would be entitled to recover. If this were so, this circumstance, (or accident, so far as plaintiff is concerned,) formed the proximate cause of the injury, and the jury have found virtually, that, had the road been in suitable repair, the injury would have been prevented. The loss, then, is the combined result of accident and of defendants' neglect to repair the road. We think, under such circumstances, the defendants are liable for the loss. It is no doubt true, that, had the accident not occurred, no damage would have been sustained. And had the defendants performed their duty, the same result would have followed. And if in every case, where injuries are produced by accidental causes, conspiring with the insufficiency of roads, towns and corporations are not liable, a case cannot well be supposed, in which they would be liable. For it is well settled, that, when the highways are notoriously insufficient and out of repair, so that nothing, but the most downright fool-hardiness, would tempt one to venture upon them, corporations will not be held liable for damages sustained by those, who attempt to pass them. And if the highways are in any apparently tolerable condition for passing, it can hardly be supposed, that, with the most perfect carriage and harness, and most docile and manageable team, with skilful driving, any loss would occur. The liability of corporations, to afford any security to travellers, must be for similar injuries to the present. If the injury would have been prevented, had the road not been insufficient, or out of repair, the loss, in justice, ought to fall upon the corporation, unless the plaintiff has conducted in such a way as to increase the hazard.

In every case of damage, occurring on the highway, we could suppose a state of circumstances, in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too head-strong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against *these* constantly occurring accidents, that towns are required to guard, in building highways. The traveller is not bound to see to it, that his carriage and harness is

always *perfect*, and his team of the *most manageable* character, and in the *most perfect training*, before he *ventures* upon the highway. If he could be always sure of all this, he would not require any further guaranty of his safety, unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable.

The judgment of the county court is, therefore, affirmed:

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BENNINGTON COUNTY.

FEBRUARY TERM, 1837.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " STEPHEN ROYCE, } *Assistant Justices.*
 " JACOB COLLAMER, }

JOHN AUSTIN v. A. M. AUSTIN, and S. C. RAYMOND,—Bill.

and

Bennington,
 February,
 1837.

S. C. RAYMOND v. J. and A. M. AUSTIN,—Cross bill.

(In Chancery.)

A receipt in full of all demands is no evidence of the discharge of a mortgage given to secure the party's future support.

A mortgage, conditioned for the support of the mortgagee, admits of compensation; and where the mortgagor has conveyed his interest, the purchaser will be permitted to redeem, by making compensation for part support, to be settled by the master, and paying a specific allowance for the future.

The facts in this case are stated in the opinion of the court, delivered by

PHELPS, CHANCELLOR. This subject comes before us upon a bill and cross bill, and the real parties litigant are John Austin and S. C. Raymond, Alanson M. Austin having little or no interest in the result. The material facts appear to be these. John Austin, the orator in the original bill, being possessed of a farm in Dorset, and being advanced in life, conveyed the same to his son, A. M. Austin, and took from his son a mortgage, conditioned for the support of himself and wife, during their natural lives. This mortgage was executed and recorded on the 13th day of May, 1826. Subsequently to this, viz. on the 17th of March, 1827, John Austin, for some consideration not shewn to us, executed to his son, Alanson, a receipt of the following tenor, viz.

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"Received, Manchester, March 17, 1827, of Alanson M. Austin, seven hundred and fifty dollars, in full for a bond, which I hold against him, also a note for seventy-five dollars, which I also hold against him, and in full of all other demands to this date, as witness my hand," &c.

This receipt was, on the 20th of the same month, recorded in the town records in Dorset, but the object and purpose of procuring it to be recorded are not disclosed. Subsequently to this, to wit, in April, 1828, Alanson M. Austin, being then in possession of said farm, applied to Raymond for a loan of money, and procured a loan of four hundred dollars, for which he executed a mortgage of the same farm.

Alanson M. Austin having become insolvent and left the country, John Austin brings his bill to foreclose his mortgage; and Raymond, who is made defendant, brings his cross bill, seeking for a discovery, and to have his mortgage preferred to that of the orator, partly upon the ground that the orator's mortgage has been satisfied and discharged, and partly upon the ground of an alleged fraudulent collusion between the Austins, to deceive and induce him to make the loan, upon the supposition that the previous incumbrance was discharged. Although there are some things about the case, which appear suspicious, yet the proof of any fraudulent practice, on the part of John Austin, falls altogether short of establishing the fact. The case, therefore, turns upon the effect of the papers already mentioned: It is insisted in behalf of the defendant, Raymond, that the effect of the receipt, executed by John to Alanson, is to discharge the mortgage. The receipt does not purport in terms to discharge the mortgage. It specifies a bond and also a note. It is diffi-

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cult to conceive what connexion the note can have with the condition of the mortgage. As to the bond it may have been given as collateral to the mortgage; but there is nothing in the case to show that it has any connexion with the subject of the controversy here; and we cannot proceed upon conjecture as to its tenor or purpose. So far, therefore, as the subject matter of the receipt or discharge is specified in the instrument, there is nothing to sustain the position of the defendant, Raymond. Nor can it have that effect as a receipt in full of all demands. The word, demands, must be understood to refer to subsisting debts, at least, to such as are absolutely due and susceptible of liquidation. It would not embrace a right to future support, which is, from its nature, contingent; depending upon the uncertainty of the party's life for its continuance, and upon a variety of circumstances, which cannot be anticipated, for its amount. The receipt not purporting to discharge the mortgage, the recording of it becomes unimportant. The orator's deed, must, therefore, have the preference, and the only remaining question is as to the terms of the decree.

Shall the orator's deed to Alanson be vacated, and the title be revested in him? Or shall Raymond be let in to perform the condition? There are insuperable objections to the former course. Alanson had certainly an interest which he could legally transfer, and Raymond, as a *bona fide* purchaser, has certainly a right to retain that interest, if it be of any value. It would, moreover, be a new thing to set aside a deed upon such grounds, especially at the expense of a subsequent purchaser.

It is argued, however, that the case does not admit of compensation. There is, certainly, no difficulty in making compensation for past maintenance, any more than in any case of a contract to perform services; and, as to future support, the contract, is as susceptible of performance by Raymond now, as it was by Alanson in the outset.

As to the wilful default of Alanson, if it were wilful, it ought not to prejudice Raymond. The case will, therefore, be referred to the master, to ascertain what will be a reasonable compensation for the past, over and above the use of the farm, which the orator has occupied, and what will be the probable amount, *per annum*, hereafter, and also the value of the use of the farm.

Raymond will be decreed to pay the difference for the time

past, as also to pay the like difference for the future ; with an option to the orator to surrender the farm, and take an annual allowance for his support, or, if he so elect, to pay Raymond's mortgage and take the farm absolutely.

As to Alanson, both parties are entitled to a decree against him.

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1. It is no ground of abatement that a writ, returnable to the county court, is signed by a justice of the peace, who is interested in the event of the suit.—*Graham v. Todd*, 166

2. No intendment will be made in favor of a plea in abatement. In such plea an argumentative allegation is bad on demurrer. A plea in abatement, for defective service, must show that the service attempted was defective, and that the writ was not served in any other way.—*Pearson v. French*, 349

3. In deciding the sufficiency of a plea in abatement, the court will not look into the writ and officer's return, unless they are referred to in the plea. *Ib.*

ABSCONDING DEBTOR.

A person, sued as trustee, may plead in bar that the person, as whose trustee he is sued, is not an abscond-

ing or concealed debtor, and a judgment, on such plea, is not open to review.—*Emerson et al. v. Paine, Trustee*, 271

ACCOUNT.

1. In an action of account against one, as tenant in common of lands, counting upon the statute remedy, the declaration must set forth the particular interest and estate of each party, in the land, and must allege, directly, that defendant has received more than his just share of the profits of the estate, or it will be bad on demurrer.—*Brinsmaid, Administrator v. Mayo*, 31

2. A plea in bar to such action, in the name of an administrator, setting forth that the intestate had parted with all interest in the land, before his decease, by conveying the same to the present plaintiff, is good for so much of the declaration as claims to recover of defendant, as bailiff of plaintiff, in his representative capacity. *Ib.*

3. Account will not lie to recover damages, as for a tort. *Ib.*

4. A plea in bar, that plaintiff has recovered the same lands in ejectment, and damages for the use, will be good in an action of account, for all the time subsequent to the disseizin alleged, and found in the former action. *Ib.*

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ASSIGNMENT.

1. When all the notes, secured by a mortgage, are assigned, the mortgage passes with them, but when a part only are assigned, whether the whole mortgage, or a proportionate part, or any interest therein, is assigned, depends on the real contract and actual agreement of the parties. *Langdon et al. v. Keith*, 299

2. If an assignment of the whole mortgage be made, by mistake, instead of a part, that may be corrected, in chancery, by a bill brought for that purpose, against the proper parties. *Ib.*

3. But if such assignee has conveyed, for a valuable consideration, to a *bona fide* purchaser, without notice of any mistake or claim by the original mortgagee, no decree will be made against him, to the prejudice

of his interest, subsequently accruing. *Ib.*

ATTACHMENT OF PROPERTY

If property be attached by a deputized person, to charge such property in execution, the execution must be delivered to the same person, within thirty days after the judgment, or, if delivered to another officer, it must be demanded or taken by him, within thirty days, or the attachment is dissolved.—*Clark v. Washburn*, 302

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ATTORNEY.

1. If an attorney receive a demand for collection; and the debtor leave demands with the same attorney for collection, the avails to be applied on the first demand when realized, this creates no lien on the demands left by the second creditor, in favor of the first creditor or of the attorney, for the security of the first debt.—*Goodrich v. Mott*, 395

2. In such case, the attorney, in making the collection for the second creditor, acts solely as his attorney; and such creditor has the right to control such demands, without consulting the attorney. *Ib.*

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On issuing a writ of *audita querela*, no other recognizance for cost is required by the statute of 1822, than was required by the 11th section of the judiciary act.—*Brown v. Stacy*, 118

AUTHORIZED PERSON.

A person regularly authorized to serve a writ, by a justice of the peace, may serve the same, in any county, to the officers of which it may by law be directed, though it is not, in fact, directed to such officers.—*Clark v. Washburn*, 302

B.

BAIL.

If an execution issue irregularly. *Ib.*

it may, on motion, be set aside. If issued prematurely, and the bail are injured, the bail, in a *scire facias* against them, may shew that fact by plea.—*Mattocks v. Judson*, 343

BASTARDY.

1. A prosecution, under the statute, may be sustained by the overseer of the poor, against the putative father of a bastard child, in the name of the mother, though said mother, after the birth of said child, was married, and at the time of the prosecution, was a *feme covert*, her husband joining in said prosecution, by joining with her in the written request and prayer for the warrant.—*Sisco v. Harmon*, 129

2. In prosecutions for bastardy, the practical construction of the statute has been to permit copies of the proceedings, before the magistrate, to be used in the county court. And this seems to be the proper course. But the supreme court, as a court of error, has nothing to do with this question, as it is purely a matter of practice, to be regulated by the county court, by its own rules. *Ib.*

BOOK ACCOUNT.

1. In an action of book account, where the "debit side of the plaintiff's book" is made to exceed one hundred dollars, by the entry of items, which the party had no right to charge on book, and which he did not insist upon as a ground of recovery, the jurisdiction of the court is not affected by such entry.—*Scott & Co. v. Sampsons*, 339

2. The jurisdiction of a justice of the peace, in the action of book account, is not affected by a charge made through mistake.—*Phelps & Bell v. Wood*, 399

3. Neither is the jurisdiction, in such case, affected by the accruing interest during the pendency of the suit, or by a charge of interest, which the plaintiff might recover, if the suit would warrant a recovery, to that extent. *Ib.*

4. Whether services, charged in plaintiff's account, were performed by him, at the request of defendant, is a matter of fact for the auditor to determine, and, unless it appears that he found the fact, without any evidence, it cannot be assigned as error. *Ib.*

C.

CHANCERY.

1. In petitions for rehearing in chancery, the whole case is open to both parties.—*Sparhawk et al. v. Admr. of Buell et al.* 41

2. The appropriate remedy, for the recovery of a legacy of the executor, by the legatee, is in chancery. *Ib.*

3. Such claim is not within any of the statutes of limitation, nor does any presumption of payment, in such case, arise in less time than twenty years, unless corroborated by proof of other circumstances. *Ib.*

4. Such claim is not barred by not being presented to the commissioners of insolvency, on the estate of the executor, but may still be pursued in chancery. *Ib.*

5. If chancery have appropriate jurisdiction of the subject matter of the bill, and a defendant be joined, who is ultimately liable for the amount, for which the orator is entitled to a decree, the court will retain the bill, and pass a decree against the defendant ultimately liable. *Ib.*

6. A testator conveyed to defendant a farm, and took back a bond and mortgage. The executor brought a bill to compel a performance of the bond; according to the construction claimed by him. The answer stated the bond and mortgage, and claimed that the defendant had performed the condition thereof: *Held*, that the construction to be given to the bond, as well as whether the same had been performed, were questions to be tried in the courts of law; that the remedy of the orator was wholly at law, and the bill was dismissed without prejudice, but with cost.—*Clapp's ex'r. v. Titus*, 211

7. When a part of the notes, secured by a mortgage, are assigned, and the whole, instead of a part of the mortgage, is assigned, by mistake, such mistake may be corrected in chancery.—*Langdon et al. v. Keith*, 299

COLLECTOR.

A collector's advertisements of particular land taxes must be signed by him, as collector.—*Spear, Admr. v. Ditty*, 282

COMMITMENT.

See EXECUTION.

COMPOUNDING OF PENALTY.

A note given, in whole or in part, for the compounding of penalties, or suppressing of criminal prosecutions, is void and uncollectable.—*Hinesburgh v. Sumner et al.* 23

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CONDITION PRECEDENT.

A decree of the court of chancery, made to depend upon the performance of a condition *precedent*, is of no force whatever, until such condition is complied with. If an authority be conferred upon condition of the appointee giving security for the faithful discharge of the office, the giving of the security is a condition precedent to the vesting of the authority. *Sparhawk et al. v. Buell's Admr. et al.* 41

CONSIDERATION.

1. Where, on the purchase of a patent right, notes are given for the consideration, and those notes are paid after the purchaser had full knowledge, or the means of knowledge of all the facts, such payment is voluntary, and there cannot be a recovery back of the sum paid; although the purchaser might have avoided payment of the notes for want of consideration.—*Stevens v. Head*, 174

2. If one procure another to become his surety, and subsequently procure a third person to sign a promise of indemnity to the first surety, there being no new consideration, and this not being done in consideration of any contract, made at the time of the original contract, the contract of indemnity is void, for want of consideration.—*Riz v. Adams et al.* 233

3. Forbearance to sue for an indefinite time, or a promise to remain, assuery for another, for an indefinite time, is no sufficient consideration for a promise to pay the debt, in the one case, or to indemnify the surety in the other. 16.

4. A subscription, by which the subscribers individually promise to pay the Treasurer of the State the sums annexed to their names, toward building a State House, is not void for want of consideration, or as against public policy.—*State Treasurer v. Cross et al.* 259

See COMPOUNDING OF PENALTY.

CONTRACT.

1. If one escape from another State and be arrested here, in obedience to our statute, as a fugitive from justice, and contract with the party aggrieved for his release, such contract, while executory, is void, as against good policy.—*Dizon v. Olmstead*, 310

2. Both parties are to be considered *in pari delicto*, and if the party accused pay money or other thing, to obtain his release, the law will not aid him in recovering it back again. 16.

3. How far misrepresentation, as to the title of the land, will affect the contract, where the conveyance is by quit claim deed.—*Richardson v. Boright*, 368

4. The party in interest in a contract, resting in parol, may sue upon it.—*Lapham v. Green*, 407

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The covenant, arising out of the

words "yielding and paying," in a lease, is an implied covenant, and the lessee is not liable on it for rents accruing after an assignment of his term.—*Kimpton v. Walker*, 191

D.

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Damages in ejectment can never be recovered, unless the *land*, or some portion of it, is recovered.—*Smith v. Benson*, 138

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1. In the case of a deed of lands, the court will not presume it to have been recorded, or require the opposite party to search the records of the proper office, before resorting to oral evidence of its contents.—*Mattocks v. Stearns & Wife*, 326

2. How far misrepresentation, as to the title of the land, will affect the contract, where the conveyance is by quit-claim deed.—*Richardson v. Boright*, 368

See **FLOWING LAND**, 2.

DEMAND OF PROPERTY ATTACHED.

1. If property be attached by a deputized person, to charge such property in execution, the execution must be delivered to the same person, within thirty days after the judgment, or, if delivered to another officer, it must be demanded or taken by him, within thirty days, or the attachment is dissolved.—*Clark v. Washburn*, 302

2. When the attachment is made by one officer, and the execution is

delivered to another, with directions to levy on the property attached, it is the duty of the officer, who has the execution, to demand the property of the one making the attachment.—*Ayer v. Jameson*, 363

DEVASTAVIT.

See **EXECUTOR**, 1, 2.

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DIVISION OF TOWN.

An imperfect division, evidenced by a plan, or by parol, acquiesced in by the proprietors, is good against a stranger.—*Sawyer v. Newland*, 383

DIVISIONAL LINE.

1. If two persons own equal parts of a lot of land in severalty, but not divided by any visible monuments, if both are in possession of their respective parts for fifteen years, acquiescing in an imaginary line of division during that time, that line is thereby established as the divisional line.—*Beecher v. Parmele et al.*, 352

2. That line, in such case, will be considered as drawn through the centre, in such manner as to leave the parts equal, and as nearly similar as possible, unless the parties have evinced a consent that it shall be otherwise drawn, in which case their consent or acquiescence will govern. *Ib.*

DIVORCE.

The husband's interest in the wife's lands is determined by a divorce, *a vinculo*.—*Mattocks v. Stearns & Wife*, 326

E.

EJECTMENT.

1. Damages in ejectment can never be recovered, unless the *land*, or some portion of it, is recovered.—*Smith v. Benson*, 138

2. If wife's lands be levied upon,

on execution against the husband, and he remain in possession after the expiration of six months from the levy, he is a wrong-doer, and may be sued in ejectment.—*Mattocks v Stearns & Wife*, 326

ENROLMENT.

See MILITIA, 1.

ESTOPPEL.

Matter of estoppel must be so pleaded, or it will be considered as waived.—*Brinsmaid, Admr. v. Mayo*, 31

EVIDENCE.

1. A receipt, not under seal, acknowledging to have received full payment of a debt or legacy, is *prima facie* a bar to the recovery of such debt, and may be relied upon as evidence of payment.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. But it is competent to give parol evidence to contradict such receipt, and, if it be proved to have been given without consideration, it is of no force, as a defence to the suit. *Ib.*

3. Where, on the sale of articles of personal property, a bill of sale is given, describing the property sold, and receipting the price, but containing no warranty: *Held*, that the purchaser could not give *parol* evidence to prove a warranty.—*Reed v. Wood*, 285

4. If the county court admit evidence of notice to the opposite party to produce a deed, before any evidence is given of the existence of the deed, and, the deed not being produced, permit the party to proceed and prove its contents, it is an informal mode of proceeding, but no ground of error. The court below has a discretion in regard to the order of introducing testimony.—*Mattocks v. Stearns & Wife*, 326

5. If the opposite party, in whose possession a deed is presumed to be, is out of the State, notice to his counsel, to produce the original, is suffi-

cient to warrant the introduction of secondary evidence of its contents. *Ib.*

6. The declarations of one in possession of land, whether as tenant or proprietor, are evidence (as against those, who derive their possession through him,) of the manner in which the land has been occupied.—*Beecher v. Parmele et al.* 352

7. The party is not obliged to shew such declarations by the person making them, although he be living, and a competent witness. *Ib.*

8. An imperfect division, evidenced by a plan, or by parol, acquiesced in by the proprietors, is good against a stranger.—*Sawyer v. Newland*, 383

9. A receipt, which contains no contract, although executed at the same time, and in reference to the same subject matter of the contract, need not be produced in evidence of the contract.—*Goodrich v. Mott*, 395

10. And if such writing or receipt contain the contract, and is not in the power of the party, it need not be produced. *Ib.*

EXECUTION.

1. If a debtor is committed on a writ of execution, when it ought to have been levied on property, his remedy is by an action against the officer. The commitment is not thereby rendered void. And it *seems*, that to entitle the debtor to any redress in such a case, he should have been willing to acquiesce in the taking of his property.—*Warner v. Stockwell et al.* 9

2. An execution, issued by a justice of the peace, upon a judgment, in which the debt or damages do not exceed the sum of fifty three dollars, should be made returnable in sixty days, though the damages and costs, together, exceed that sum.—*Allen v. Warren*, 203

3. If property be attached by a de-

putized person, to charge such property in execution, the execution must be delivered to the same person, within thirty days after the judgment, or, if delivered to another officer, it must be demanded or taken by him, within thirty days, or the attachment is dissolved.—*Clark v. Washburn*, 362

4. If an execution issue irregularly, it may, on motion, be set aside. If issued prematurely, and the bail are injured, the bail, in a *scire facias* against them, may shew that fact by plea.—*Matlocks v. Judson*, 343

5. On demurrer to a writ of *scire facias*, the court cannot notice, either that the execution issued within twenty-four hours, or that it was not issued by permission of the judges. *Ib.*

6. The lien, created by attachment of personal property, is preserved by giving the execution, within thirty days, to the officer attaching.—*Ayer v. Jameson*, 363

7. When the attachment is made by one officer, and the execution is delivered to another, with directions to levy on the property attached, it is the duty of the officer, who has the execution, to demand the property of the one making the attachment. *Ib.*

8. An attachment, made by the sheriff's deputy, is the same as if made by him, and the lien is preserved by delivering the execution to the sheriff. *Ib.*

9. How the officer may make an execution his own, by acts, showing his intention, understandingly made, to adopt it as such.—*Goodrich v. Mott*, 395

See MILITIA, 4.

" LEVY OF EXECUTION, 1.

" OFFICER, 1, 2.

EXECUTOR.

1. One executor is not liable for the *deceit* of another joint executor, where he never had the control or possession of the funds.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. But if both take possession of the goods jointly, or if one, having possession of the goods, suffer them to go into the hands of another executor, who squanders them, both are liable for the waste. *Ib.*

3. If executors give a joint bond for faithful administration, each is liable for the acts of the others. The statute in force, in the compilation of Tolman's edition of the statutes, requires executors to give a bond for faithful administration; "in the same manner administrators were by law required to do," and, under such statute, an executor's bond, providing that the executors shall pay all legacies, is a valid and binding obligation, as coming within the fair intent and meaning of the statute. *Ib.*

4. An executor is not liable to pay interest on a legacy, due to infant legatees, and no time of payment specified, until guardians are appointed, and the executor is notified of such appointment, unless he has actually received interest on the money, or the money was so invested that he might have received interest without incurring an unreasonable hazard. *Ib.*

See CHANCERY, 2, 4.

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EXEMPTION FROM ATTACHMENT.

Personal property, exempt from the levy of execution, is not to be held liable in the hands of a trustee.—*Parks & Co. v. Cushman, Trustee*, 320

F.

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See HUSBAND & WIFE.

FINES.

See MILITIA, 2, 4.

FLOWING LAND.

1. *R.*, being the owner of a farm and a fall of water, conveys by deed all the land, which shall be subject to be covered by water, in consequence of a dam six feet high from

low water mark, between Sept. and May; and in a subsequent deed conveys, with a like description, excepting the lands of *B.* and *J.*: *Held*, that the deed conveyed a right to flow all the grantor's land by such dam: That the dam might be raised six feet from the bed of the stream as it was when the deed was executed.—*Mow-
et al. v. Hutchinson*, 242

2. *M.*, who was the owner of works on the dam, together with *H.*, purchased the farm which was owned by *R.*, and agreed upon a division, but the deed was taken to them jointly, and they released, each to the other, their respective portions of the farm, agreeably the division: *Held*, that the release from *M.* to *H.* conveyed the right which he had, as owner of the works, to flow the land thus released; but that it was inequitable that it should so operate, and that *H.* should be enjoined from giving the lease in evidence, as conveying the right, which *M.* had to flow the lands. *Ib.*

3. A right to flow, derived from grant, is not lost by *non user*, when it cannot be used without disturbing the right of others, but may be exercised, whenever the right of the others can be extinguished or bought, *Ib.*

FRAUDS, STATUTE OF.

A promise to pay the debt of a third person is a collateral promise, and within the statute of frauds, and must be proved in writing, if the original debtor still remains liable for the debt; but if, by the terms of the contract, the original debtor is discharged, and it remains no longer a debt against him, it is an independent contract, and not within the statute. *Anderson v. Davis*, 136

H.

HIGHWAY.

1. If a road be out of repair, and an injury happen by reason of such want of repair, and the plaintiff or his agents are guilty of no want of

care and prudence, the town is liable, notwithstanding the primary cause of the injury was a failure of a nut or bolt, which was insufficient or improperly fastened.—*Hunt and Wife v. Pownal*, 411

2. If there be no fault on the part of the plaintiff, which common sagacity and forecast could have anticipated and provided against, and the loss be the combined result of accident and the insufficiency of the road, the plaintiff may recover.—*Ib.*

HUSBAND AND WIFE.

1. The maker of a promissory note, made payable to the wife during coverture, and for her separate property, is not, on that account, liable to be sued, as the trustee of the husband.—*Parks & Co. v. Cushman, Trustee*, 320

2. Personal property, inherited by the wife during coverture, after a decree of distribution made by the probate court, is liable to attachment by the trustee process, in the hands of the administrator, at the suit of the husband's creditors.—*Ib.*

3. The husband has such an interest in the freehold estate of the wife, after issue born alive, as may be taken by levy of execution, by his creditors.—*Mattocks v. Stearns & Wife*, 326

4. This interest is liable to be defeated by a divorce, *a vinculo*.—*Ib.*

5. The mode of levy is by metes and bounds, and to exhaust the interest of the husband, as far as the levy extends.—*Ib.*

6. If the husband remain in possession of the land, after the expiration of six months from the levy, he is a wrong-doer, and may be sued in ejectment.—*Ib.*

7. The wife is not liable to be joined in such suit.—*Ib.*

8. But if she be joined, the plaintiff may amend, on terms, by striking out her name, and take judgment against the husband.—*Ib.*

See WITNESS. 1.

I.

INFANCY AND INFANT.

1. The age of majority of females, in this state, is fixed by the constitution, at eighteen years.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. In an action against several joint contractors, if one avails himself of infancy, as a defence, the plaintiff may proceed to judgment against the others, or may enter a *nolle prosequi*, as to the infant, and proceed against the others.—*Butler v. Allen et al.* 122

3. If an infant receive a deed of land, and execute a mortgage to secure the purchase money, he cannot avoid the mortgage and affirm the deed.—*Richardson v. Boright.* 363

4. Every contract of an infant, merely voidable, will bind him, after becoming of full age, unless he disaffirm it, within a reasonable time after becoming of full age. *Ib.*

See EXECUTOR, 4.

INJUNCTION.

See FLOWING LAND, 2.

INSOLVENT ESTATES.

1. Debts, not presented to the commissioners on insolvent estates, are barred, whether the creditors reside within the state or not.—*M'Collum v. Hinckley et al.* 143

2. If a creditor of such estate, with surety, refuse to present his claim to the commissioners for adjustment, when requested so to do, by the surety, the surety will be released from his liability.—*Ib.*

3. But where the surety applies to a court of chancery, before the suit is brought, as he may do, to be released from his obligation on such debt, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditors, the deficiency, out of which the surety will be permitted to deduct his costs, and

the balance, if any, be paid to the creditor.—*Ib.*

4. If the creditor, by mere negligence, fail to present his claim to the commissioners in time, so that he loses his remedy against the estate, the estate being in fact solvent, it would seem, he could not afterwards recover of the surety. *Ib.*

5. At all events, chancery will not interfere in his behalf, to enable him to obtain a decree against the estate, on the ground of the primary liability of the surety, and the ultimate liability of the estate; such possibility of action, in the surety, if it exist, not being one of those trusts, which the creditor can compel him to surrender to his use. *Ib.*

INTEREST.

See EXECUTOR, 4.

J.

JOINDER OF PARTIES.

See HUSBAND & WIFE, 7, 8.

JURISDICTION.

1. In an action before a justice of the peace, on a promissory note, exceeding twenty dollars, but indorsed below ten dollars, the *ad damnum* in plaintiff's writ being ten dollars, and there being no plea in off-set, the case is not appealable.—*Boardman v. Harrington,* 151

2. If, in such case, the defendant first plead in off-set, in the county court, (or if the plea was not *bona fide* in the court below,) it will not make the case appealable. *Ib.*

3. In an action upon a promissory note, originally above twenty dollars, and indorsed below that sum, but not below ten dollars, it would seem the case is still appealable. *Ib.*

4. A justice has no jurisdiction of an action for breaking and entering the plaintiff's close, and taking and carrying away his horse, 'to his damage \$100.'—*Prindle v. Cogswell,* 183

5. In an action of book account,

where the "debit side of the plaintiff's book" is made to exceed one hundred dollars, by the entry of items, which the party had no right to charge on book, and which he did not insist upon as a ground of recovery, the jurisdiction of the court is not affected by such entry.—*Scott & Co. v. Sampsons*, 339

6. The jurisdiction of a justice of the peace, in the action of book account, is not affected by a charge made through mistake.—*Phelps & Bell v. Wood*, 399

7. Neither is the jurisdiction, in such case, affected by the accruing interest during the pendency of the suit, or by a charge of interest, which the plaintiff might recover, if the suit would warrant a recovery, to that extent. *Ib.*

JUSTICE OF THE PEACE.

1. That a writ returnable to the county court, is signed by a justice of the peace, who is interested in the event of the suit; is no ground of abatement.—*Graham v. Todd*, 166

2. A person, who has acted as grand juror, in prosecuting for an offence before a justice of the peace, is incompetent to try a civil action, brought to recover redress for the supposed criminal act.—*Freelove v. Smith*, 180

3. A justice has no jurisdiction of an action for breaking and entering plaintiff's close, and taking and carrying away his horse, "to his damage \$100.—*Prindle v. Cogswell*, 183

4. A person regularly authorized to serve a writ, by a justice of the peace, may serve the same, in any county, to the officers of which it may by law be directed, though it is not, in fact, directed to such officers.—*Clark v. Washburn*, 302

See AFFINITY.

" JURISDICTION.

JUSTICES' COURTS.

1. The absence of a justice of the peace from the place, to which a cause has been adjourned by him, for the whole half day, within which the

cause was set for trial, is a discontinuance of the action.—*Brown v. Stacy*, 118

2. *Quare.* Whether his absence from such place, for two hours after the time, would operate as a discontinuance. *Ib.*

3. Those general provisions, in our statute, relating to judicial proceedings, which are framed with particular reference to the county and supreme courts, must, when necessary, be applied to justices' courts, with such qualifications, as are requisite to effect the object intended by the legislature.—*Phelps & Bell v. Wood*, 399

L.

LANDLORD AND TENANT.

1. The tenant cannot dispute the title of his landlord, until he has first *bona fide* surrendered his possession.—*Greeno v. Munson & Munson*, 37

2. The same doctrine extends to mortgagor and mortgagee, trustee and *cestui que trust*, vendor and vendee, and to all other cases, where one is in possession of lands, acknowledging the title of another.—*Ib.*

3. But if the person in possession of lands, under such relation, repudiate the contract; and give the one, under whom he went into possession; notice that he shall no longer hold under him, the relation ceases, the possession becomes adverse, and the statute of limitation begins to run.—*Ib.*

4. But in no other way, can the person in possession of lands, under such relation, ever acquire title against him, under whom he went into possession. *Ib.*

5. A person in possession of land, by conveying his interest to another, becomes tenant to that other, so long as he retains possession, and the grantee, as landlord, is liable to ejectment by a third person.—*Hodges et al. v. Gates*, 178

See USE AND OCCUPATION.

" COVENANT.

LAND TAXES.

See COLLECTOR.

LEASE.

The covenant arising out of the words "yielding and paying," in a lease, is an implied covenant, and the lessee is not liable on it for rents, accruing after an assignment of his term.—*Kimpton v. Walker*. 191

See USE AND OCCUPATION.

LEGACY.

1. A bequest of "one thousand dollars to the children of —," creates an estate or interest, in joint tenancy, with the *jus accrescendi*, and where some of the legatees de cease, after the death of the testator, before the recovery of the legacy, the interest vests in the survivors.—*Sparhawk et al. v. Admr. of Buell et al.* 41

2. The appropriate remedy for the recovery of a legacy of an executor, by the legatee, is in chancery. *Ib.*

See PROBATE COURT, 3.

LEVY OF EXECUTION.

The levy of an execution, upon a part of the interest of one tenant in common, should be upon an aliquot portion of the tenant's entire interest, and if not so made, but upon the tenant's entire interest in a portion of the estate, described by metes and bounds, it is void.—*Smith v. Benson*. 138

See EXECUTION, 1.

See HUSBAND AND WIFE, 3. 5.

LEX LOCI.

See MORTGAGE, 4.

LICENSE.

A license to enter must be pleaded, or, if given in evidence under the general issue with notice, the plaintiff may recover for all the trespass not justified by the license.—*Sanyer v. Newland*. 383

LIEN.

1. If an attorney receive a demand for collection, and the debtor leave demands with the same attorney for collection, the avails to be applied on the first demand when realized, this creates no lien on the demands left by the second creditor, in favor of the first creditor, or of the attorney, for the security of the first debt.—*Goodrich v. Mott*, 395

2. In such case, the attorney, in making the collection for the second creditor, acts solely as his attorney, and such creditor has the right to control such demands, without consulting the attorney. *Ib.*

3. In order to create a lien for the security of the first debt, a contract to that effect is necessary, which should be distinctly notified to the officers and debtor, in the secondary collections, or they will be allowed to take the directions, and make payment to the nominal creditor in the execution. *Ib.*

See EXECUTION, 6, 8.

LIMITATION, STATUTE OF.

1. A claim by a legatee, against an executor, for a legacy, is not within any of the statutes of limitation, nor does presumption of payment, in such case, arise in less time than twenty years, unless corroborated by proof of other circumstances.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. In an action on the case for a deceit, it is not a sufficient answer to the statute of limitations, that the plaintiff was ignorant of his cause of action, until within six years, although that ignorance was occasioned by the nature of the deceit, or the manner, in which the fraud was perpetrated.—*Smith v. Bishop*. 110

3. Whether, in any case, a distinct subsequent fraud, perpetrated after the cause of action arose, by which the party is kept in ignorance of his rights, would furnish a sufficient an-

swer to a plea of the statute, *quære*. If it would, still the practice complained of must be in itself *a fraud*, and the party must be deceived as to facts material to the action. *Ib.*

4. If two persons own equal parts of a lot of land in severalty, but not divided by any visible monuments, if both are in possession of their respective parts for fifteen years, acquiescing in an imaginary line of division during that time, that line is thereby established as the divisional line. *Beecher v. Parmele et al.* 352

5. If the plaintiff bring a suit before a justice of the peace, who once continues the cause, and is absent at the second time appointed, by which the suit is necessarily discontinued, he may bring another suit within one year after such discontinuance, and the statute of limitations will not be a bar to the suit, unless the cause of action had become barred before the commencement of the former action. *Phelps & Bell v. Wood,* 399

6. Such discontinuance, although not within the terms of the proviso of the statute of limitations, in relation to suits failing of trial on the merits, is so far within the equity of such proviso, as to prevent the statute from attaching. *Ib.*

M.

MILITIA.

1. A citizen is not exempted from enrolment in the militia on account of bodily infirmity, if his infirmity is not open to observation, and is unknown to the officer making the enrolment. And upon being enrolled, he becomes subject to military jurisdiction, until disenrolled in the manner prescribed by statute.—*Warner v. Stockwell et al.* 9

2. In the imposition and remission of fines, militia officers act judicially, and in cases within their jurisdiction their final decisions are conclusive. *Ib.*

3. Sergeants' warrants may be

signed in blank, and entrusted to captains, with authority to fill up and deliver out the same to the sergeants of their respective companies. And when such a warrant is accepted and acted upon by a sergeant, its validity is not impaired by the fact, that it had previously been filled up for another person, and delivered to him. *Ib.*

4. The doings of a sergeant under a writ of execution for a fine, if regular in form, will be sustained by proof that he was a sergeant *de facto*, having been duly elected and sworn. *Ib.*

MISREPRESENTATION.

See CONTRACT, 3.

MISTAKE.

See CHANCERY, 7.

" ASSIGNMENT, 2, 3.

MORTGAGE.

1. The sale and conveyance of real estate, in payment of a pre-existing debt, with a simple right of repurchase on the part of the debtor, is valid, and is not a mortgage, even in equity.—*Baxter v. Willey,* 276

2. But, in such contract, it is essential that the debt be extinguished absolutely, *in presenti.* *Ib.*

3. If the object of the contract be to secure the payment of the debt, and not to *extinguish* it, except upon the happening of some subsequent event, or the default of the debtor to pay by a given day, the transaction is a mortgage, and no form of words will enable the parties to foreclose the debtor's equity of redemption. *Ib.*

4. If such contract be made in a foreign country, the creditor will not be permitted to pursue his debt here, unless it is shown, that, by the law of the place of contract, the debtor will be considered as having an equity of redemption in the land. *Ib.*

5. At law, the conveyance of land, agreed to be received in payment of a pre-existing debt, although the securities are not surrendered, there

being no defeasance under seal, passes the absolute title to the estate. *Ib.*

6. When all the notes, secured by a mortgage, are assigned, the mortgage passes with them, but when a part only are assigned, whether the whole mortgage, or a proportionate part, or any interest therein, is assigned, depends on the real contract and actual agreement of the parties. *Langdon et al. v. Keith*, 299

7. If an assignment of the whole mortgage be made, by mistake, instead of a part, that may be corrected, in chancery, by a bill brought for that purpose, against the proper parties. *Ib.*

8. But if such assignee has conveyed, for a valuable consideration, to a *bona fide* purchaser, without notice of any mistake or claim by the original mortgagee, no decree will be made against him, to the prejudice of his interest, subsequently accruing. *Ib.*

9. Where *W.* sold personal property to *J.*, and took notes, and a mortgage, to secure the payment of the sums, but the property was immediately put into the possession of *J.*, who continued in the use and possession thereof: *Held*, that the mortgage was void as against the creditors of *J.*—*Woodward v. Gates et al.* 358

10. Where such mortgage was executed in New-Hampshire, the mortgagor residing in this State: *Held*, that the law of New-Hampshire did not make valid such mortgage in this State; as the mortgage was not, and could not be recorded in this State, in pursuance of the laws of New-Hampshire. *Ib.*

11. If an Infant receives a deed of land, and execute a mortgage to secure the purchase money, he cannot avoid the mortgage and affirm the deed.—*Richardson v. Boright*, 368

12. A mortgage, conditioned for the support of the mortgagee, admits of compensation; and where the mortgagor has conveyed his interest,

the purchaser will be permitted to redeem, by making compensation for past support, to be settled by the master, and paying specific allowance for the future.—*Austin v. Austin et al.* 420

MORTGAGOR & MORTGAGEE.

1. A mortgagee in possession, having obtained a decree of foreclosure, is not accountable, at law, to the mortgagor, for the rents and profits of the mortgaged premises, after such decree.—*Chapman v. Smith, Trustee*, 153

2. Nor is he accountable for the rents and profits before such decree, unless they were allowed by the master on taking the account. *Ib.*

3. The only remedy of the mortgagor, in such a case, is in equity. *Ib.*

4. *Quære.* Whether he has any remedy, except by a bill of review brought on the decree. *Ib.*

5. Under the statutes of the State of New York, on a sale of mortgaged premises at public auction, the mortgagee may become a purchaser, and is accountable for only the sum bid, and may proceed at law on his bond for the balance.—*Sabin v. Stickney*, 155

6. It does not afford evidence of collusion or fraud, that he has sold the premises at an advanced price, that the persons to whom he sold were present at the public sale and did not bid, unless they were prevented from bidding by the procurement of the mortgagee. *Ib.*

N.

NON USER.

See FLOWING LANDS, 3.

NOTICE TO PRODUCE PAPERS.

1. If the county court admit evidence of notice to the opposite party to produce a deed, before any evidence is given of the existence of the deed, and, the deed not being produced,

permit the party to proceed and prove its contents, it is an informal mode of proceeding, but no ground of error. The court below has a discretion in regard to the *order* of introducing testimony.—*Mattocks v. Stearns & Wife*, 326

2. If the opposite party, in whose possession a deed is presumed to be, is out of the State, notice to his counsel, to produce the original, is sufficient to warrant the introduction of secondary evidence of its contents. *Ib.*

O.

OFFICER.

1. An action against a town for the neglect of the constable, in not levying, collecting, and returning an execution, cannot be sustained by proof of his having actually collected the execution, but neglected to pay the money to the creditor.—*Barber v. Town of Benson*, 171

2. No such action can be sustained against the officer, or the town, if it appear that there was, in fact, no such judgment, as that described in the execution. *Ib.*

3. A person regularly authorized to serve a writ, by a justice of the peace, may serve the same, in any county, to the officers of which it may by law be directed, though it is not, in fact, directed to such officers.—*Clark v. Washburn*, 302

4. How the officer may make an execution his own, by acts, showing his intention, understandingly made, to adopt it as such.—*Goodrich v. Mott*, 395

See MILITIA, 2.

“ EXECUTION, 1.

P.

PARTIES.

1. In contracts, made by agents, without disclosing the principal, the suit, to enforce them, may be in the name of the principal or agent.—*Lapham v. Green*, 407

2. A dormant partner may join in a suit, or not, at the election of the plaintiffs. *Ib.*

3. In such cases, when the suit is not brought in the name of the party contracting ostensibly, the defendant will be entitled to make any defence, which he could have made, had the suit been in the name of the person, with whom the contract was made. *Ib.*

4. A suit, upon a subscription, by which the subscribers individually promise to pay the State Treasurer the sums annexed to their names, toward building a State-house, may be sustained in the name of the Treasurer.—*State Treasurer v. Cross et al.* 269

5. In all actions *ex contractu*, the plaintiff, under the statute of 1835, may recover against one or more defendants, and the other defendants recover their costs, whether the suit be upon a contract in writing or not. *Broughton v. Fullers*, 373

6. The party in interest in a contract, resting in parol, may sue upon it.—*Lapham v. Green*, 407

PARTNERS & PARTNERSHIP.

1. One of three partners (the partnership being notorious,) purchases a horse, for which he gives his individual note: The partners are not liable, although the avails of the horse, when sold, go into the partnership fund.—*Holmes v. Burton et al.* 252

2. A dormant partner may join in a suit, or not, at the election of the plaintiffs.—*Lapham v. Green*, 407

3. In such case, when the suit is not brought in the name of the party contracting ostensibly, the defendant will be entitled to make any defence, which he could have made, had the suit been in the name of the person, with whom the contract was made. *Ib.*

PATENT RIGHT.

1. A conveyance of a right to use a patent right in a limited territory

is not required to be recorded in the patent office.—*Stevens v. Head*, 174

2. Where a right to use an invention, secured by patent, is conveyed, and the vendee has not been disturbed in the exercise or use, the vendee must shew that the person conveying has no such right, if he seeks to recover against the vendor, on the ground that no right was conveyed. *Id.*

PAUPER.

The following return on a warning out process, to wit: "Aug. 22d, 1806, I then served this precept by leaving a true and attested copy of the same, and return, with the within named N. W., as the law directs," is sufficient.—*Fairlee v. Corinth*, 265

PLEADING.

1. Matter of estoppel must be so pleaded, or it will be considered as waived.—*Brinsmaid, Admr. v. Mayo*, 31

2. If a plea in bar is insufficient, or one, which the defendant has no legal right to interpose, it must be met by replication or demurrer. That the county court received such a plea is no ground of exception or error.—*Emerson et al. v. Paine, Trustee*, 271

3. On demurrer to a writ of *scire facias*, the court cannot notice, either that the execution issued within twenty-four hours, or that it was not issued by permission of the judges.—*Mattocks v. Judson*, 343

4. No intentment will be made in favor of a plea in abatement. In such plea, an argumentative allegation is bad on demurrer. A plea in abatement, for defective service, must show that the service attempted was defective, and that the writ was not served in any other way.—*Pearson v. French*, 349

5. In deciding the sufficiency of a plea in abatement, the court will not look into the writ and officer's return, unless they are referred to in the plea. *Id.*

6. A license to enter must be pleaded, or, if given in evidence under the general issue with notice, the plaintiff may recover for all the trespass not justified by the license.—*Sawyer v. Newland*, 383

See ACCOUNT, 2, 4.

PRACTICE.

In prosecutions for bastardy, the practical construction of the statute has been to permit copies of the proceedings, before the magistrate, to be used in the county court. And this seems to be the proper course. But the supreme court, as a court of error, has nothing to do with this question, as it is purely a matter of practice, to be regulated by the county court, by its own rules.—*Sisco v. Harmon*, 123

PRESUMPTION.

In the case of a deed of lands, the court will not presume it to have been recorded, or require the opposite party to search the records of the proper office, before resorting to oral evidence of its contents.—*Mattocks v. Stearns and Wife*, 326

PRESUMPTION OF PAYMENT.

See LIMITATION OF ACTIONS, 1.

PRINCIPAL AND AGENT.

In contracts, made by agents, without disclosing the principal, the suit to enforce them, may be in the name of the principal or agent.—*Lapham v. Green*, 407

PROBATE COURT.

1. The decrees of probate courts, within their appropriate jurisdiction, and when the subject matter of the adjudication is sufficiently expressed, will be presumed to have been made upon other sufficient previous proceedings, unless the contrary appear from the records themselves.—*Sparhawk et al. v. Buell's Admr. et al.*, 41

2. The decrees of probate courts

are as conclusive as the orders, sentences, or decrees of any other court, within their proper sphere of jurisdiction. *Id.*

3. But the proceedings of these courts being in the nature of proceedings *in rem*, they are only conclusive upon matters directly adjudicated, and not upon matters collaterally recited. The decree is conclusive for the purpose for which it was made, and no further. In the settlement of an administrator's or executor's account, the decree is conclusive, as to the proper distribution of the estate, but if debts or legacies be credited the executor or administrator, as so much money paid, the creditors or legatees are not thereby concluded. But should the residuary legatee question his right to pay such debt or legacy, the decree will be conclusive. *Id.*

4. A testator made a bequest to a trustee, to be applied to the benefit of the *cestui que trust*, as should be found necessary, in the judgment and discretion of the judge of probate for the district of H.—*Held*, that the trustee was accountable for the property, received as trustee, in a court of Chancery, and not in the court of probate; that, in the exercise of the discretion and judgment, confided to him, the judge of probate acted personally and not officially, and no appeal lay, to the supreme court, from his proceedings and doings.—*Downer v. Downer*. 231

5. In appeals from the probate court, this court sits as a supreme court of probate. The whole case, both law and fact, is before them, but the facts must be found by commissioners.—*Smith's Heirs v. Riz Admr.* 240

6. The court of probate, by petition for that purpose, may correct errors in its former decrees, after any lapse of time short of twenty years, where the interest of the parties only is concerned. But this should only be done, where the errors are appa-

rent, or conceded by the parties, or proved beyond all doubt. *Id.*

PROMISSORY NOTE.

1. L. deeded to M. a tract of land subject to a lease, which, as to one part, expired 1st of February, and the residue, 1st of May, and also subject to a mortgage to one D. of about \$700,00, and covenanted that the mortgage should be discharged before the expiration of the lease, or that M. should not be obliged to make any further payments on the notes given to secure the purchase money. \$300,00 of the purchase money was paid when the deed was given. In an action on one of the notes: *held*, that the ambiguity arose from the testimony, shewing the payment of the \$300,00; that the parties intended by the term "*expiration of the lease*," the time when it first expired as to part, viz. 1st of May, and that the failure of L. to discharge the mortgage to D. before that time, operated as a release of all the notes given for the purchase money.—*Foot v. Mazhams*. 223

2. Where a person, not a party to a note, signs his name on the back, without any words to express the nature of his undertaking, he is considered as a joint promisor with the other signers, and if any of the other signers are merely sureties, he is considered as a co-surety with them.—*Flint v. Day*. 345

3. If a promissory note be altered in a material point, by consent of one signer, without the consent of the other signer, it is the note of the first, but not of the other, and, if declared upon as the joint note of both, the plaintiff may recover against one, and the other recover his costs.—*Broughton v. Fullers*. 373

See COMPOUNDING OF PENALTY.

- " CONSIDERATION, 1.
- " TROVER, 1, 2.
- " TRUSTEE ACTION, 3.
- " ASSIGNMENT, 1.
- " DATE.

PUBLIC POLICY

See CONSIDERATION, 4.

R.

RECEIPT.

1. A receipt, not under seal, acknowledging to have received full payment of a debt or legacy, is *prima facie* a bar to the recovery of such debt, and may be relied upon as evidence of payment.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. But it is competent to give parol evidence to contradict such receipt, and, if it be proved to have been given without consideration, it is of no validity. *Ib.*

3. A receipt, which contains no contract, although executed at the same time, and in reference to the same subject matter of the contract, need not be produced in evidence of the contract.—*Goodrich v. Mott*, 395

4. And if such writing or receipt contain the contract, and is not in the power of the party, it need not be produced. *Ib.*

5. A receipt in full of all demands is no evidence of the discharge of a mortgage, given to secure the party's future support.—*Austin v. Austin et al.* 420

See SHERIFF, 1.

RECOGNIZANCE.

See AUDITA QUERELA.

REDEMPTION, EQUITY OF.

See MORTGAGE, 12.

REHEARING.

See CHANCERY, 1.

RELATIONSHIP.

See AFFINITY.

RENT.

See USE & OCCUPATION.

" COVENANT.

RENTS & PROFITS.

See MORTGAGOR & MORTGAGEE.

VOL. IX.

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REVIEW.

A person, sued as trustee, may plead in bar that the principal debtor is not an absconding or concealed debtor, and a judgment on such plea is not open to review.—*Emerson et al. v. Paine, Trustee.* 271

S.

SALE.

1. Where *W.* sold personal property to *J.*, and took notes, and a mortgage, to secure the payment of the sums, but the property was immediately put into the possession of *J.*, who continued in the use and possession thereof: *Held*, that the mortgage was void as against the creditors of *J.*—*Woodward v. Gates et al.* 358

2. Where such mortgage was executed in New-Hampshire, the mortgagor residing in this State: *Held*, that the law of New-Hampshire did not make valid such mortgage in this State; as the mortgage was not, and could not be recorded in this State, in pursuance of the laws of New-Hampshire. *Ib.*

SERJEANT.

See MILITIA, 3, 4.

SERVICE OF WRIT.

If an attachment of personal property be begun on Saturday night, before the going down of the sun, it may be completed at the first convenient time after.—*Pearson v. French*, 349

SHERIFF.

1. In an action by the sheriff, against the receiptor of goods attached, the latter cannot set up, in defence, a want of the delivery of the goods to him, or that no such goods were attached.—*Allen v. Butler, et al.* 122

2. An attachment, made by the sheriff's deputy, is the same as if made by him, and the lien is preserved by delivering the execution to the sheriff.—*Ayer v. Jameson*, 363

See OFFICER, 1, 2.

SUBSCRIPTION.

1. A suit, upon a subscription paper,

by which the subscribers individually promise to pay the State Treasurer the sums annexed to their names, toward building a State-house, may be sustained in the name of the Treasurer.—*State Treasurer v. Cross et al.* 289

2. It is no defence, in an action on such paper, that the whole sum subscribed exceeded the amount to be raised, but the subscription should abate *pro rata*. *Ib.*

SURETY.

1. If a creditor of an insolvent estate, with surety, refuse to present his claim to the commissioners for adjustment, when requested so to do, by the surety, the surety will be released from his liability.—*McCullum v. Hinckley et al.* 143

2. But where the surety applies to a court of chancery, before the suit is brought, as he may do, to be released from his obligation on such debt, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditors, the deficiency, out of which the surety will be permitted to deduct his costs, and the balance, if any, be paid to the creditor.—*Ib.*

3. If the creditor, by mere negligence, fail to present his claim to the commissioners in time, so that he loses his remedy against the estate, the estate being in fact solvent, it would seem, he could not afterwards recover of the surety. *Ib.*

4. At all events, chancery will not interfere in his behalf, to enable him to obtain a decree against the estate, on the ground of the primary liability of the surety, and the ultimate liability of the estate; such possibility of action, in the surety, if it exist, not being one of those trusts, which the creditor can compel him to surrender to his use. *Ib.*

5. Where a person, not a party to a note, signs his name on the back,

without any words to express the nature of his undertaking, he is considered as a *joint promisor* with the other signers, and if any of the other signers are merely sureties, he is considered a co-surety with them.—*Flint v. Day.* 345

See CONSIDERATION. 2. 3.

T.

TENANT.

See LANDLORD and TENANT.

TENANT IN COMMON.

1. One tenant in common cannot convey a part of his interest in the estate by metes and bounds, without the consent of the co-tenant.—*Smith v. Benson.* 138

2. The levy of an execution, upon a *part* of the interest of one tenant in common should be upon an aliquot portion of the tenant's entire interest, and if not so made, but upon the tenant's entire interest in a portion of the estate, described by metes and bounds, it is *void*. *Ib.*

TRESPASS ON THE FREEHOLD.

1. The proprietor of land, having right to immediate possession, may expel a mere intruder upon the same, by such force as may be necessary, and he will, in any event, acquire a rightful possession of the land, and if he be guilty of a breach of the peace or a trespass upon the person of the intruder, he must answer for that.—*Bescher v. Parmelee et al.* 352

2. An entry upon land, under a deed, claiming title to the same, and cutting and selling timber from time to time, and exercising acts of ownership, is a sufficient possession to maintain an act of trespass *quare clausum fregit* against a stranger.—*Sawyer v. Newland.* 383

See JURISDICTION. 4.

TROVER.

1. Action of trover may be main-

tained by the maker of a note, which has been paid and left, by mistake, in the hands of the holder.—*Pierce v. Gibson*, 216

2. But such action cannot be maintained, when the fact of payment is denied by the holder. *Ib.*

TRUSTEE ACTION.

1. A negotiable promissory note is liable to be taken by a trustee process, as the property of the payee, notwithstanding an assignment of it by him, unless the maker has notice of the assignment. But after it has been once assigned, the rule is different, and it cannot be taken as the property of a subsequent holder, after a *bona fide* assignment by him, although no notice is given to the maker.—*Britton v. Preston, Trustee*. 257

2. A person, sued as trustee, may plead in bar that the person, as whose trustee he is sued, is not an absconding or concealed debtor, and a judgment on such plea is not open to review.—*Emerson et al. v. Paine, Trustee*. 271

3. Where H. executed a note to G., which G. sold to P. and received the amount, of which P. immediately gave notice to H.: Held, that H. could not be held as the trustee of G., on the ground that the sale of the note to P. was done with the intent to enable G. to abscond, and thereby defraud his creditors. The question of fraud cannot be tried between two trustees upon their own disclosures: and there is no provision for trying such question by the trustee, by jury. Also held, that, to constitute one trustee of another, he must be indebted or hold property in trust, and as neither H. nor P. were indebted to G., nor was the note, or the amount due them, holden for his benefit in any way, they could not be adjudged his trustees.—*Hutchins v. Hawley et al. Trustees*. 295

4. Personal property, exempt from

the levy of execution, is not to be held liable in the hands of the trustee.—*Parks & Co. v. Cushman, Trustee*. 320

5. The maker of a promissory note, made payable to the wife during coverture, and for her separate property, is not, on that account, liable to be sued as the trustee of the husband. *Ib.*

6. Personal property inherited by the wife during coverture, after a decree of distribution made by the probate court, is liable to attachment by the trustee process, in the hands of the administrator, at the suit of the husband's creditors. *Ib.*

U.

USE AND OCCUPATION.

Where there is an express promise to pay a certain rent, and the premises are actually occupied and not surrendered by the tenant, during the term, assumpsit for use and occupation may be sustained and the whole rent recovered, though most part of the premises were consumed by fire during the term, and there was, no written contract.—*Voluntine v. Godfrey*. 186

V.

VENDOR & VENDEE.

1. If one sell the betterments on a lot of land to another, and it is agreed by both parties, that the title is in a third person, and the vendee is to run the hazard of procuring that title, he may take a deed of such third person at any time, and hold the land against the vendor of the betterments, even although he have not paid the vendor the price of such betterments.—*Downer v. Richardson*, 377

2. If the vendor, in such case, is employed to negotiate with the owner of the land, for procuring the title, if he is bound to convey immediately to the vendee, his power is revocable, and the vendee may take a conveyance

of the owner of the land, without the vendor's consent, and hold the land against him, even before he has paid the price of the betterments. *Ib.*

3. In the case of vendor and vendee of real estate, no right of recovery in ejectment for the lands exists in favor of the former against the latter, unless the vendee fails to perform the contract on his part, and, especially, where the vendor is the occasion of the contract not being carried into full effect, or where he has put it out of his power to perform the stipulations on his part. *Ib.*

See PATENT RIGHT, 2.

VENUE.

1. An action to recover damages of a town, or other corporation, for an injury happening through the insufficiency of a road, which it is made their duty by statute to repair, is not local, so as to require the action to be brought in the county where the injury occurred.—*Hunt & Wife v. Pownal*, 411

2. *Quære*: Whether any action could be here sustained for such an injury happening without the State. *Ib.*

W.

WARNING.

See PAUPER.

WARRANT.

See MILITIA, 3

WARRANTY.

Where, on the sale of articles of personal property, a bill of sale is given, describing the property sold, and receipting the price, but containing no warranty: *Held*, that the purchaser could not give *parol* evidence to prove a warranty.—*Reed v. Wood*, 285

WILL.

The purchase, after the execution of a will, of land, which would be included in the general description of the land devised by the will, is no revocation of the will, in whole or in part.—*Blandin et al. v. Blandin*, 210

WITNESS.

1. If one of two or more defendants in Chancery, suffer the bill to be taken as confessed, and other defendants answer, and testimony is taken, the wife of the defendant, *defaulted*, cannot testify, on the part of the orators, against the other defendants, on the ground that her testimony tends to charge her husband; for if no decrees passes against the defendants answering, none can be had against the defendant, against whom the bill is taken as confessed.—*Sparhawk et al. v. Buell's Admr. et al.* 41

2. If, by the terms of a contract to pay the debt of a third person, the original debtor is discharged, he is not a competent witness for the plaintiff to prove such contract.—*Anderson v. Davis*, 136

3. Testimony may be given to shew that a violent quarrel existed between the party and a witness, introduced against him, without enquiring of the witness, as to the quarrel.—*Pierce v. Gilson*, 216

4. The declarations of one in possession of land, whether as tenant or proprietor, are evidence (as against those, who derive their possession through him,) of the manner in which the land has been occupied.—*Beecher v. Parmele et al.* 352

5. The party is not obliged to show such declarations by the person making them, although he be living and a competent witness. *Ib.*

Ex. G. A. C.



HARVARD